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Supreme Court, U.S.
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In The
Supreme Court of the United States

STATE OF LOUISIANA,

Petitioner,

v.

WALTER JOSEPH KOON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals, Fifth Circuit

PETITION FOR WRIT OF CERTIORARI FILED ON BEHALF OF THE STATE OF LOUISIANA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit applied proper deference to the state courts' decisions in this habeas corpus proceeding.

2. Whether the Fifth Circuit properly applied the Supreme Court of the United States standard in this habeas corpus proceeding when addressing an ineffective assistance of counsel claim.

PARTIES

The petitioner is Burl Cain, the Warden of Louisiana State Penitentiary, represented by the Office of the District Attorney for the Nineteenth Judicial District Court for the State of Louisiana. The respondent is Walter Joseph Koon, a death row inmate convicted and sentenced pursuant to Louisiana law.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of Louisiana representing Warden Burl Cain, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Fifth Circuit is reprinted at Pet. App. 1. Its order denying rehearing and rehearing en banc is reprinted at Pet. App. 202. The unpublished decision of the United States District Court for the Middle District of Louisiana is reprinted at Pet. App. 32. The state district court's hearing and oral ruling is unreported and reprinted at Pet. App. 85. The Louisiana Supreme Court's ruling denying review is reported at *State ex rel. Koon v. State of Louisiana*, 00-1205 (La. 1/26/01), 781 So.2d 1258, and reprinted at Pet. App. 201.

JURISDICTIONAL STATEMENT

The Fifth Circuit entered judgment on May 1, 2008. A timely petition for rehearing and rehearing en banc was denied on May 28, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Appendix, Pet. App. 204-208, reproduces the text of the Sixth Amendment, U.S. Const. amend. VI, and the provisions of 28 U.S.C. §2254 at issue in this case.

STATEMENT OF THE CASE

A. Statement of Relevant Facts

At noon on March 5, 1993, respondent and a passenger, Sarah Robinson, drove to the Baton Rouge home of his in-laws, Richard and Felicie Guidry, where his estranged wife, Michelle Guidry, was staying. Armed with a semi-automatic pistol, he parked in the driveway, walked through the carport to the backyard, pulled the gun from the waistband of his pants, and shot his wife twice, killing her. As Felicie Guidry began to call 911 for help, respondent entered the home and shot her at close range. She died shortly thereafter. Respondent then shot Richard Guidry twice in the chest and then after he had fallen, moved closer to Mr. Guidry and shot him twice more at close range, killing him.

Respondent drove directly to his trailer, where he called the Sheriff's Office, informing a detective that he had just killed three people in Baton Rouge. Respondent made several statements to police regarding his commission of the killings, including statements that there was "one other son-of-a-bitch" whom he

would have liked to kill. Respondent also informed detectives that he was drinking a beer.

Once in custody respondent agreed to talk to the investigating officer. When asked why he had committed a triple murder, respondent said he killed his wife because she wanted his business as part of a divorce settlement, he killed Mrs. Guidry because she was encouraging Michelle to try to take his business away from him, and that he killed Mr. Guidry because respondent knew he was going for a weapon.[1] During this confession, respondent appeared cold and satisfied that he had committed the crimes.

B. Proceedings Below

TRIAL AND APPELLATE PROCEEDINGS

Walter Joseph Koon was charged by a three-count indictment with the first degree murders of his wife and her elderly parents, in violation of Louisiana Revised Statute 14:30.[2] Initially, respondent was represented by the public defender. Respondent was dissatisfied with this representation, leading the district court to appoint Kevin Monahan, a private criminal defense attorney, as his counsel. Monahan was specifically sought out for the appointment given

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[1] The so-called reason for the murders changed in the federal habeas proceedings.

[2] Bill of Indictment No. 3-93-1268.

his recent success in a multiple-victim death penalty case.

During the two-year period between indictment and jury selection, Monahan spent hundreds of hours "walking and talking" and "living and dying" respondent's case.[3] Monahan used his personal investigator, paralegal, and secretary for assistance while preparing the case.

Respondent's trial occurred in March 1995. During the guilt phase of trial, Monahan presented testimony from doctors and psychologists concerning respondent's mental state at the time of the murders in an attempt to lessen his culpability for the crimes. Monahan presented the testimony of a medical doctor, who testified about respondent's medical condition immediately preceding the murders and the drugs he prescribed to combat respondent's acute bronchitis. A clinical psychologist opined that respondent's alcohol and drug abuse, along with a rapid withdrawal from Xanax, affected his ability to know right from wrong. A hospital pharmacologist testified about the effect a rapid withdrawal from alcohol and Xanax has on the human body, noting that seizures, psychosis, and death were sometimes a result.[4] Another mental health provider testified that respondent gave him a history of being

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[3] Pet. App. 163.

[4] This expert recalled a history petitioner had given him of taking 12-15 Xanax tablets a day along with drinking up to a case of beer a day.

abused by his father, suffering from substance abuse problems including cocaine, Valium, and Xanax, becoming aggressive when he drank alcohol, and taking approximately 150 Xanax tablets in the two-week period prior to the murders.

In addition to this expert testimony, respondent's mother and two nephews testified about respondent's condition. His mother told the jury about his seeking treatment for his chronic alcoholism. His nephews noted his weakened condition and his ingestion of Xanax prior to the murders. Finally, respondent took the witness stand, confirming the history given to his expert witnesses. He then claimed that he was suffering from withdrawal from alcohol and Xanax which caused him to go into a "tunnel" or "pipe" from which he could not tell what he was doing.[5]

The jury rejected respondent's insanity and alternative manslaughter defenses, returning unanimous verdicts of guilty as charged on all three counts of first degree murder. During the sentencing phase of the trial, counsel recalled respondent's mother to the stand and explained to the jury that the defense was relying heavily on evidence introduced during the guilt phase. Monahan also reiterated certain aspects of the guilt-phase evidence, including respondent's alcohol and drug problems, lack of criminal history, emotional problems, and undue influence by

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[5] State Appellate Record p. 2065.

others.[6] The jury unanimously decided that respondent should be sentenced to death.

Respondent appealed his case to the Louisiana Supreme Court. That Court addressed all eleven assignments of error, finding no merit. *State v. Koon,* 96-1208 (La. 5/20/97); 704 So.2d 756. Thereafter, respondent applied to the United States Supreme Court for a writ of certiorari, which the Court denied. *Walter J. Koon v. Louisiana,* 522 U.S. 1001, 118 S.Ct. 570, 139 L.Ed.2d 410 (1997).

POST CONVICTION PROCEEDINGS

In 1998, respondent sought post conviction relief with the state district court. In the application, respondent asserted nine claims, mainly consisting of claims of ineffective assistance of counsel.

In an exhaustive report, the state court Commissioner recommended dismissal of all claims except certain ineffective assistance of counsel claims. On March 21, 2000, the district court judge conducted an evidentiary hearing on those claims with the same judge presiding that had presided at respondent's trial. Respondent's trial counsel, Monahan, testified that he investigated Koon's background and chose not to present additional character witnesses at sentencing because they would have provided negative information. Because respondent "came across as a

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[6] State Appellate Record pp. 2318-2320.

cold-hearted killer," his family had all but abandoned him. Monahan explained:

> I can't say why his family abandoned him at the penalty phase but I do know this, Mr. Koon was like a different person on the stand. I[t] was like I had never even met that person that got up on the stand. When he called Mr. Guidry a bully and the whole courtroom erupted in laughter and I looked at the jury and the jury was laughing, I just couldn't believe it.[7]

Monahan indicated his intent to present penalty phase testimony from respondent's two brothers and a minister. However, because respondent was the worst witness Monahan had ever seen on the stand, the brothers and the minister declined to testify on respondent's behalf.[8]

The district court judge denied respondent's ineffective assistance of counsel claims, providing lengthy reasons for his decision. He entered findings of fact and relied on the conclusions of law previously produced by the commissioner.[9] Respondent sought supervisory review with the Louisiana Supreme Court, which was denied. *State ex rel. Koon v. State of Louisiana,* 00-1205 (La. 1/26/01); 781 So.2d 1258.[10]

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[7] Pet. App. 152.

[8] Pet. App. 161.

[9] Pet. App. 188-196.

[10] Pet. App. 201.

FEDERAL HABEAS CORPUS PROCEEDINGS

Respondent next filed an application for writ of habeas corpus. Both parties briefed the issue of whether an evidentiary hearing should be conducted. Over the State's objection, the district court set the matter for hearing. After several days of hearing, the federal judge ruled that respondent's convictions and sentences should be reversed and vacated.

FEDERAL APPEAL PROCEEDINGS

The State of Louisiana appealed the grant of habeas by the district court to the Fifth Circuit Court of Appeals. In a brief, unpublished per curiam opinion, the court agreed with the assessment of the district court. The Fifth Circuit failed to indicate how the state courts' decisions were unreasonable other than to conclude, as the district court judge did, that they disagreed with the state court's rulings. Although the appellate court noted that deference was due to the decisions of the state courts, it failed to apply that standard under proper Supreme Court precedent.

REASONS FOR GRANTING THE WRIT

1. There is a split in the Circuits regarding the application of 28 U.S.C. §2254(d).

Recently, this Court granted certiorari in *Bell v. Kelly*, 07-1223 (oral argument on November 12, 2008). The question presented in *Bell* concerns a split in the circuits regarding the application of 28 U.S.C. §2254(d) where new evidence is presented in a federal court. The petitioner in *Bell* noted that there is a six-circuit split, noting that the Ninth and Tenth Circuits hold that no deference is due when new evidence is presented in federal courts. *See Killian v. Poole,* 282 F.3d 1204 (9th Cir. 2002), *Harris v. Terhune,* 92 Fed. Appx. 462, 463 (9th Cir. 2004), and *Cargle v. Mullin,* 317 F.3d 1196 (10th Cir. 2003). On the other hand, the Fifth, Sixth, and Seventh Circuits disagree. Those courts apply §2254(d) even where new evidence relevant to a *Strickland*[11] or *Brady*[12] claim has surfaced for the first time on federal habeas. *See Johnson v. Luoma,* 425 F.3d 318, 324, 328 (6th Cir. 2005), *Pecoraro v. Walls,* 286 F.3d 439, 443 (7th Cir. 2002), and *Valdez v. Cockrell,* 274 F.3d 941, 951-53 (5th Cir. 2001). The Eleventh Circuit recognized this conflict in *LeCroy v. Secretary, Florida Dept. of Corrections,* 421 F.3d 1237 (11th Cir. 2005). The Fourth Circuit decision in *Bell* appears to adopt a hybrid view depending

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[11] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[12] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

on whether the claim was one of ineffectiveness or a *Brady* claim.

Since this Court is already reviewing the proper application of §2254(d) and since that standard will directly affect the outcome of this case, this Court should grant the certiorari application.

2. There is general confusion as to the amount of deference that state court decisions are entitled to receive under 28 U.S.C. §2254(d) and the burden of proof required by §2254(e).

First, a federal habeas court does not exercise supervisory power over state courts where the state reasonably applied clearly established law. However, neither of the federal courts that considered this case addressed the findings or the unreasonableness of the state courts' decisions. Instead, the federal courts merely substituted their judgment for that of the state courts.

Despite all of the evidence at the state court trial, respondent's own display of cold-bloodedness on the witness stand, and the overwhelming evidence of guilt, the federal courts concluded that trial counsel was ineffective at the guilt phase and the penalty phase of the trial. Each of these alleged failures was considered and rejected by the state courts and should have been entitled to true deference.

The panel decision noted this Court's standard for reviewing state habeas cases, but failed to properly apply that standard to the facts of this case. The panel noted that state courts' decisions are entitled to deference unless they are "objectively unreasonable,"[13] but the panel's analysis failed to accord any deference whatsoever to the findings of facts and law of the state courts.

To succeed, respondent must do more than show that he satisfied *Strickland*'s test in federal court, because under §2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. Rather, he must show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner. *Bell v. Cone*, 535 U.S. 685, 698-699, 122 S.Ct. 1843, 1852 (2002).

A federal court may not overrule a state court for holding a view different from its own, when the precedent from this Court is, at best, ambiguous. The question becomes whether the state determination is an "unreasonable *application* of clearly established Federal law," *Mitchell v. Esparza*, 540 U.S. 12, 17, 124 S.Ct. 7, 11-12 (2003).

Under §2254(d)'s "unreasonable application" clause, a federal habeas court may not issue the writ simply because it concludes in its independent judgment that

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[13] Pet. App. p. 8.

the state-court decision applied *Strickland* incorrectly. Rather, it is the habeas applicant's burden to show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner. An "*unreasonable* application of federal law is different from an *incorrect* application of federal law." The Ninth Circuit did not observe this distinction, but ultimately substituted its own judgment for that of the state court, in contravention of 28 U.S.C. §2254. The federal habeas scheme leaves primary responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable. Whether or not we would reach the same conclusion as the California Supreme Court, "we think at the very least that the state court's contrary assessment was not 'unreasonable.'" *Woodford v. Visciotti*, 537 U.S. 19, 24-27, 123 S.Ct. 357, 360-361 (2002).

In the instant case, the state courts considered the overwhelming evidence of guilt against the one phrase that Sarah Robinson failed to utter at the trial and found it to be inconsequential. However, the federal courts placed too much emphasis on the evidence introduced in federal court and no emphasis whatsoever on the state court record. It assumed that manslaughter verdicts might have been a possible outcome, if Robinson would admit that she actually told her lover that his estranged wife was having an affair, and that would be sufficient provocation to justify three manslaughters. However, neither federal court opinion noted the elements of manslaughter in

Louisiana, the likelihood of getting three manslaughter verdicts when the in-laws had done nothing to provoke him, or the overwhelming evidence that respondent was a cold-blooded killer. Consequently, the State submits that it is the decisions of the federal courts in this case that are "objectively unreasonable," not the state court decisions.

Numerous other decisions by this Court since the adoption of the AEDPA have attempted to instruct lower federal courts on this standard, including at least three on this Court's docket for argument this term. In *Schriro v. Landrigan*, ___ U.S. ___, 127 S.Ct. 1933, 1942, 167 L.Ed.2d 836 (2007), this Court noted:

> Neither *Wiggins* nor *Strickland* addresses a situation in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court. *Wiggins, supra,* at 523, 123 S.Ct. 2527 ("[W]e focus on whether the investigation supporting *counsel's* decision not to introduce mitigating evidence of Wiggins' background was itself reasonable" (emphasis added and deleted)). Indeed, we have never addressed a situation like this. In *Rompilla v. Beard,* 545 U.S. 374, 381, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), on which the Court of Appeals also relied, the defendant refused to assist in the development of a mitigation case, but did not inform the court that he did not want mitigating evidence presented. In short, at the time of the Arizona postconviction court's decision, it was not objectively unreasonable for that court to conclude that a defendant who

> refused to allow the presentation of any mitigating evidence could not establish *Strickland* prejudice based on his counsel's failure to investigate further possible mitigating evidence.

Likewise, in *Carey v. Musladin*, 549 U.S. 70, 127 S.Ct. 649, 653-54, 166 L.Ed.2d 482 (2006), this Court attempted to give guidance on the limited role of habeas review when no precedent of this Court mandates a particular result:

> Given the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the state court "unreasonabl[y] appli[ed] clearly established Federal law." § 2254(d)(1). No holding of this Court required the California Court of Appeal to apply the test of *Williams* and *Flynn* to the spectators' conduct here. Therefore, the state court's decision was not contrary to or an unreasonable application of clearly established federal law.

A state court decision is an unreasonable application of clearly established Supreme Court precedent if the state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." The inquiry into unreasonableness is objective. A state court's incorrect application of clearly established Supreme Court precedent is not enough to warrant federal habeas relief; in addition, such an application must also be unreasonable. The state court's factual findings are

presumed to be correct, and the habeas respondent has the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. §2254(e)(1). *Williams v. Taylor*, 529 U.S. 362, 406, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

However, despite these efforts to instruct lower courts, this Court has found it necessary to grant certiorari in at least three more cases this term to discuss the same matter. *See Waddington v. Sarausad*, 07-772 (oral arguments are set for October 15, 2008); *Bell v. Kelly*, 07-1223 (oral arguments set for November 12, 2008); and *Knowles v. Mirzayance*, 07-1315 (brief on the merits due on September 1, 2008). In the petition for certiorari in *Knowles,* the petitioner noted that the Circuit Court "never explained how the state courts denial of relief was 'objectively unreasonable' under *Strickland.* However, the Ninth Circuit substituted its evaluation of the federal evidentiary hearing record for the state court's evaluation of the state court's record.[14]

In the instant case, the State submits that the federal courts erred by not showing proper deference to the state courts that conducted respondent's trial, appeal, and post conviction reviews. By substituting their judgment for that of the state courts, the federal district courts effectively nullified the entirety of the prior state proceedings. Utilizing the simple expediency of declaring every witness who testified in

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[14] *Knowles*, petition for certiorari p. 22.

federal court to be either "credible" or "very credible," the federal hearing became in effect a new trial instead of a habeas proceeding. Additionally, the federal judge largely ignored the facts, evidence, affidavits, and testimony that were prepared and preserved in the state proceedings, thereby viewing the witnesses presented in the federal evidentiary hearing in a near vacuum. The Court of Appeals made little or no reference to the state court record, and absolutely no reference to how or why the state court decisions were unreasonable.

In this case, the evidence is overwhelming and undisputed, even by respondent, that Koon murdered three people. Despite this, the federal district court reached the astonishing conclusion that trial counsel was ineffective at the guilt phase because he did not interview a witness who allegedly lied at trial, in a post conviction affidavit, and in a sworn statement to obtain a restraining order. The federal judge concluded that counsel was ineffective and that had he interviewed this witness that she would surely have told the truth as she allegedly did in the federal proceedings.

The state courts determined that respondent failed to meet his burden of proof. This ruling was made after consideration of the various affidavits and live testimony that were presented to the state post conviction court. Although the state trial judge did not allow all of the witnesses subpoenaed by respondent to testify, he was made aware of the import of their sworn affidavits prior to his ruling that their

live testimony was unnecessary. In fact, respondent sought review of the state district judge's decision to deny the issuance of the subpoenas. As noted by the federal district court judge, the Louisiana Supreme Court denied writs on this issue and refused to stay the scheduled evidentiary hearing. Thus, the state district court judge held a hearing. After hearing the testimony of respondent's trial counsel, considering the affidavits that had been submitted with respondent's post conviction relief application, hearing the Commissioner's Recommendation, and considering respondent's arguments for allowing further witnesses to testify, the state district judge determined that no further testimony was needed. The judge's ruling was again considered and denied by the Louisiana Supreme Court.[15] These rulings are entitled to deference unless respondent can establish by clear and convincing evidence that the state courts' rulings were incorrect or unreasonable.

Regarding the penalty phase of the trial, the federal judge ignored the large amount of mitigation evidence that trial counsel introduced in the guilt phase of the trial. Likewise, the federal courts ignored the fact that respondent's new experts testified differently in federal court than his original experts, because respondent told them a different story, i.e., that he was on drugs the day of the murders rather

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[15] *State ex rel. Koon v. State of Louisiana*, 00-1205 (La. 1/26/01); 781 So.2d 1258.

than experiencing withdrawal as he testified at trial. It is difficult to fathom how this self-serving change of testimony by respondent proves ineffective counsel at trial, when respondent's testimony was consistent with counsel's theory of the case.

Deference to state courts' determinations would be shallow and meaningless if all that is required to overturn state court rulings is to call a witness in federal court that did not testify in state court, find that witness credible, and then say that this credibility determination supercedes all state court activity. Essentially, the lower federal courts gave no consideration whatsoever to the state court proceedings. Instead, testimony at the federal hearing should have been considered in light of all of the state court proceedings, i.e., the trial and post conviction affidavits that were presented to the state courts. After considering that the state trial and post conviction judge had observed this particular witness at trial as well as her post conviction affidavit, it should have determined that the state judge's determination that post conviction relief should not be based on the ever-changing testimony of this witness was proven to be unreasonable by clear and convincing evidence. The State submits herein that nothing clear and convincing can be based on this witness' testimony.

Throughout his ruling, Judge Brady repeatedly indicates that each and every one of respondent's witnesses were "credible" or "very credible." The State maintains that the federal judge used these credibility determinations to lessen the standard of review

and deference owed to the state courts. This oversimplification of the review process resulted in a burden shifting that essentially elevated any witness who testified in federal court to a higher level than any contradictory evidence or testimony in state court. Without hearing any of the trial testimony or mentioning the post conviction evidence, the federal judge essentially conducted a one-sided examination of the evidence, all of which was based on the self-serving and questionable evidence presented in federal court that has changed considerably from the evidence introduced at trial over twelve years earlier.

Since respondent's claim arose in the context of an ineffective assistance of counsel claim, a review of this standard is necessary to show what the state courts were obligated to follow. Since the AEDPA requires state courts to follow clearly established federal law, and since comity requires that the Supreme Court of the United States is the arbiter of clearly established federal law, the state courts were obligated to follow the following standards.

The elements for ineffective assistance of counsel were set out by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In that case, the court articulated a two-pronged test for determining the adequacy of counsel's performance, a reviewing court must determine (1) whether counsel's performance was constitutionally deficient and (2) whether the performance prejudiced the defendant.

Mere error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error has no effect on the judgment. *Strickland,* 466 U.S. at 691, 104 S.Ct. at 2066. Thus, to assert successfully a claim of ineffectiveness, the defendant must affirmatively prove prejudice. To make this affirmative showing of prejudice the defendant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is probability sufficient to undermine confidence in the outcome. *Strickland,* 466 U.S. at 694, 104 S.Ct. 2068.

The foundation for respondent's claim focused on two specific lying witnesses. First and foremost, respondent relies on the lies told by Sarah Robinson. Second, the expert testimony was based on lies told to them by respondent many years after the trial and contrary to his own trial testimony. All of the discrepancies between the state trial and the federal evidentiary hearings can be traced to one of these two liars. Since the false testimony is directly attributable to respondent or is of inconsequential matters, respondent cannot utilize these alleged discrepancies to obtain a reversal of his conviction.

Sarah Robinson's testimony at the trial, during the state post conviction investigation, and at the federal habeas proceedings has been teeming with lies. In fact, Kevin Monahan spent a great deal of

time at trial demonstrating that Robinson was lying during much of her testimony.[16] Later, Robinson signed an affidavit for state post conviction purposes claiming that her trial testimony was false. Still later, she admitted during the federal evidentiary hearing that her post trial affidavit was also false.[17] Interestingly, the state post conviction judge who was aware of her questionable testimony at trial had to make a determination whether to grant a hearing based in part on her state post conviction affidavit, which she later admitted was false. Thus, her falsity on the state affidavit presented forms part of the basis for granting a hearing in federal court. Since the state court ruling should be presumed correct and was based on what respondent claimed in the federal proceeding was false testimony, respondent made the intriguing argument that the state post conviction judge was incorrect because respondent's own affiant changed her story yet again.

Simply stated, no amount of interviewing Robinson could have magically made her tell the truth. In fact, Monahan's trial strategy of arguing that she was a liar proved to be not only effective but the absolute truth. Monahan showed that the witness had previously lied

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[16] Monahan spent a great deal of his closing argument pointing out that Robinson was a liar: "She lies when she doesn't even have to lie." State Appellate Record pp. 2226-2228. Monahan demonstrated that Robinson lied in order to obtain a restraining order against her estranged spouse.

[17] Evidentiary Hearing, February 14, 2006, pp. 44-46.

under oath, and he used this to discredit her at trial. Some twelve years later, she is still lying in court and cannot be entirely believed. Likewise, the remainder of the trial defense was based on respondent's own testimony, which he now changes in federal court to suit his own interests.

Respondent, who did not choose to testify at the federal evidentiary hearing, testified at the state trial that he did not take any Xanax or other drugs on the day of the murders.[18] This fact was repeated to his expert witnesses. Based on his assertion that he was not taking any drugs at the time of the murders, his experts testified that he was experiencing drug withdrawals at the time of the murders which caused a hyperexcitable condition that contributed to his mental state on the day of the murders.

Based on respondent's self-serving change of testimony regarding his own drug usage some eleven to twelve years after the fact, it is not surprising that Dr. Seiden's and Dr. Vigen's diagnoses presented to the federal district court might be slightly different from those of the experts who testified at the state trial. What is truly surprising is how few real differences they presented. Both at trial and at the federal hearing, the experts agreed that respondent was a drug and alcohol abuser. However, since respondent's federal experts had different facts not known to the experts at trial, i.e., that respondent was actually

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[18] State Appellate Record pp. 2104, 2096, 2099.

taking Xanax on the day of the murders plus he was allegedly taking the medication prescribed for him the day before, they contend that respondent's drug usage was a "toxic soup" of chemicals.[19] Respondent's change of testimony should not constitute a basis to argue that his attorney was ineffective at trial. An attorney has to concern himself with the facts that are presented at the time of the trial and not on what might be argued twelve years later in federal court. Monahan was not in a position to change the testimony, thereby changing the diagnosis. Since respondent repeatedly indicated that he did not take drugs on the day of the murders, Monahan was forced to argue that there would not have been any murders if respondent "had just taken his Xanax."[20]

Although Judge Brady found Monahan ineffective at the guilt phase for putting "little effort into preparing Koon for testimony," the judge mistakenly attributed Koon's lack of remorse and unsympathetic trial testimony as attorney error. Apparently, he did not consider the fact that Koon may have been without remorse and unsympathetic because he was a cold-blooded killer, as the state court judge determined. Although Judge Brady noted that Koon called one of the victims a bully, apparently he attributed this to attorney error and not the callousness of Koon himself. In any event, the federal courts failed to cite

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[19] Evidentiary Hearing, February 15, 2006, pp. 4-7.

[20] State record, p. 1657.

a single case that requires reversal based on attorney error when a triple murderer appears without remorse at trial.

Under the second prong of *Strickland*, respondent must establish prejudice to prevail. In his ruling, Judge Brady mistakenly determined that the state court did not rule on the prejudice question and concluded that no deference was owed. Specifically, he stated:

> Because the state court found Monahan's representation adequate, it never reached the issue of prejudice. Accordingly, this court reviews the prejudice prong of the *Strickland* claim *de novo*.[21]

First, the State maintains that it is the state court's decision that is entitled to deference, and that it is improper for the federal court to determine that it can substitute its rulings anytime the state court did not specifically utter the magical word to indicate that it had ruled on a particular issue. Second, the state court did consider the prejudice prong. To prove prejudice, a petitioner must show that counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. In the instant case, the Commissioner's Recommendation clearly noted the law that applied to ineffectiveness. Judge Erwin repeatedly addressed the fairness of Koon's trial in his

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[21] Ruling on Petition for Writ of Habeas Corpus p. 24 fn. 5.

ruling on post conviction. Specifically, he noted that if he found a deficiency in counsel's performance then he would consider "w[as] that deficiency such that it would deprive the defendant of a fair trial[.]"[22] The state judge went to great lengths to note that the issue was one of fairness:

> But the issue is whether or not he got a fair trial because of that and whether or not Mr. Monahan was ineffective in his representation in the defense of Mr. Koon, and I don't think he was, because the jury was aware that Mr. Monahan's theory of the case was, from the opening round questioning the jurors, that because of his drug usage and then not having it, Mr. Koon was somehow not able to form specific intent to kill or inflict great bodily harm as required by the first degree murder statute.
>
> * * *
>
> And again, I don't know, especially in the guilt phase of the trial that there was any evidence that could have been excluded that was prejudicial that was not admissible that would have helped Mr. Koon at all. Mr. Koon very cold-bloodily killed three people. Mr. Koon got on the witness stand and came across as somebody who very cold-bloodily killed three people. Other than Jesus Christ or somebody coming down hear [sic] and saying differently, I don't think the jury had any

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[22] State Post Conviction hearing and ruling 3/21/00, p. 66.

> other choice, as jurors, because they are sworn if they are convinced beyond a reasonable doubt to vote guilty. I don't think there's any doubt in anybody's mind and I don't think there's any doubt in the jury's mind that Mr. Koon was guilty of first degree murder. I don't know that any of us could have prevented that and I don't know that any evidence could have prevented Mr. Koon from being convicted.[23]

After the trial court's ruling, post conviction counsel actually thanked the state judge for "giving us a fair opportunity to present our case."

Based on the foregoing, it is clear that the state court judge considered the prejudice question and found that no prejudice resulted from counsel's alleged failings in the guilt phase of the trial. This finding is entitled to deference and must be overcome by clear and convincing evidence to the contrary. The State submits that respondent has failed to meet his burden, and the federal courts erred in ruling that respondent's trial counsel was ineffective.

Judge Brady found the state court's determinations unreasonable and referred to both the ABA standards and Louisiana Supreme Court Rule 31 in support. However, Judge Brady failed to note that the Supreme Court of the United States has only required

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[23] State Post Conviction hearing and ruling 3/21/00, pp. 67-72.

that the ABA standards be referred to as guidelines. They are not absolutes, they do not have the force of law, and they do not supercede state law. As to Rule 31, the Louisiana Supreme Court is the better arbiter for determining state law matters. Neither the ABA nor Louisiana Supreme Court Rule 31 provided a basis for finding the state courts' determinations unreasonable in this case.

Analysis of the performance of counsel during the penalty phase is discussed in three recent Supreme Court opinions, specifically *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), and *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). However, these cases concern instances where the attorneys failed to conduct any appreciable investigation and thus presented little or no mitigation evidence to the jury. In the instant case, the jury had ample mitigation evidence, and respondent's chief complaint is that his attorney should have presented even more mitigation evidence, or more particularly that counsel should have "packaged" the mitigation evidence that was presented at trial in a better manner.

In *Williams*, the Court was faced with a situation where trial counsel did not prepare for the penalty phase of the trial. In addition, his attorneys failed to investigate and present substantial mitigating evidence during the sentencing phase of his capital murder trial; the omitted evidence included a description of mistreatment, abuse, and neglect during

defendant's early childhood, as well as testimony that he was "borderline mentally retarded," and that experts believed that defendant, if kept in a "structured environment," would not pose a future danger to society.

In the instant case, no such evidence has been produced by respondent. Most, if not all, of the alleged mitigation evidence was discussed at the guilt phase of respondent's trial. In fact, respondent did not demonstrate any new fact at the hearing except that Sarah Robinson lied. Phyllis Mann, a criminal defense attorney called as an expert witness, argued that the so-called "smoking gun" in this case is that Robinson lied, that trial counsel was not fully aware of respondent's drug usage, and the failure to call the family members who testified at the federal hearing.[24] Judge Brady essentially adopted Ms. Mann's analysis as his own. As previously demonstrated, Robinson has been shown to be a habitual liar from the beginning of this case, respondent lied about his own drug usage, and the state court made a factual determination that respondent's family members opted not to testify at trial. These findings are entitled to deference under the AEDPA.

Although Judge Brady characterized the entire penalty phase as "a lonely two pages in the record"[25]

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[24] Evidentiary hearing, February 16, 2006, pp. 68-71.

[25] Ruling on Petition for Writ of Habeas Corpus Pet. App. 69.

his analysis failed to consider all of the evidence introduced in the guilt phase that constitutes mitigation evidence. The list of things that Judge Brady cited that the jury never heard failed to show either attorney deficiency or prejudice under *Strickland* and its progeny. Judge Brady cited as excluded mitigation evidence (that the jury never heard): that respondent was dependent on alcohol, cocaine, Xanax, and Valium, that he suffered a substance-induced mood disorder, that family members testified about his work ethic, family loyalty, and love, that he had no significant criminal history, etc. In sum, "[t]he court finds that Monahan failed to tell Koon's story to the jury, and thus the jury failed to hear who Koon, the whole human being, truly was."[26]

Monahan discussed and presented evidence regarding respondent's drug and alcohol dependence. Likewise, Monahan presented evidence about respondent's work ethic, social history, etc. As to family loyalty, it is unclear how evidence of family loyalty would impress the jury when respondent admitted killing his wife and in-laws and calling his elderly father-in-law a bully at trial. Monahan presented Koon's story as much as he deemed useful and strategic at the time. Although Judge Brady felt that the story may have been told better, this is not the constitutional standard established by Supreme Court of

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[26] Ruling on Petition for Writ of Habeas Corpus Pet. App. 72.

the United States for the states to follow. On the other hand, given respondent's performance during his own trial testimony, it may be submitted that the jury was well aware of just "who Koon, the whole human being, truly was."

In *Wiggins*, trial counsel indicated in opening arguments that the jury would hear about the respondent's difficult life, but no such evidence was introduced. On post conviction, respondent argued that his attorneys should have presented evidence regarding his dysfunctional background through the testimony of a forensic social worker and the use of a social history. The *Wiggins* trial attorneys did not consult any social or psychological experts, never conducted any investigation beyond the meager evidence which was provided to them by the court documents, and never presented any of this evidence to the jury.

The instant case is the polar opposite to the situation presented in *Williams* and *Wiggins*. In the instant case, respondent's attorney presented a great deal more evidence than was adduced in *Williams* and *Wiggins*, and he performed months of preparation and investigation. Thus, *Williams* and *Wiggins* are easily distinguishable.

The most recent Supreme Court case is *Rompilla*, where the Court decided that even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, counsel is bound to make reasonable efforts

to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.

In the instant case, there is no allegation that Monahan failed to investigate evidence the State intended to use for aggravation purposes. Likewise, there is no allegation that such aggravating evidence would have led counsel to other mitigating evidence. Thus, *Rompilla* is inapposite to the present case.

Although Judge Brady agreed with respondent regarding the lack of preparation by the trial attorney, it was noted in the state court proceedings that respondent's counsel conducted extensive discovery and investigation in this case. Counsel's opening statements in the guilt phase of the trial included a history of Koon's life, including his work history, his military service history, his lack of significant criminal history, and his relationship with his murdered wife. His trial counsel also presented his history of alcohol and drug abuse, including the retention of a psychologist and pharmacologist.

The state judge considering this claim indicated that Monahan was prepared and did a good job with what he had to work with. The state judge understood the strategy pursued by Monahan was to place as much mitigation evidence before the jury during the guilt phase of the trial.

Based on the foregoing, respondent's attorney was not ineffective under the prevailing standards as noted by the Supreme Court of the United States.

Since no Supreme Court case mandates a result in the instant case, the state courts were free to apply the standards announced in the existing cases. That application of federal law should only be reversed if it is unreasonable, not where the federal court merely disagrees with the result. The federal rulings were based purely on hindsight and second-guess the work performed by respondent's capable trial counsel.

In sum, nothing that was discovered or presented during the federal hearings rises to the level of significant evidence discussed in *Wiggins, Williams,* and *Rompilla*. What little additional information that was gleaned from these proceedings originates in lies or subsequent changes in testimony by the respondent and Sarah Robinson. The state court made a factual determination that respondent's family members opted not to testify at trial. After hearing their testimony in the federal hearings, it cannot be said that any significant testimony from them should undermine the confidence in the verdict in this case.

The instant case is not an exceptional one. Even with the new federal evidence, it is still obvious that respondent is a cold-blooded killer as noted by the state court judge. Whether he was taking drugs as he now says[27] or whether he was in withdrawal as he testified at trial, the jury would know that respondent was a drug addict as well as a killer. There can

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[27] A claim of voluntary drug usage rarely wins a juror's favor.

be little doubt that a jury would have found his newly manufactured claim that he was high on the day of the killings any more sympathetic than they did his claim that he was experiencing withdrawal.

3. The Fifth Circuit erred by adopting a *per se* rule of ineffectiveness in contravention of precedents from this Court.

The federal rulings found counsel's performance was *per se* deficient. To overturn a state verdict, especially in the context of an ineffective claim, the applicant has the burden to show that counsel failed the standard of care expected of attorneys and that the failure resulted in specific prejudice, not a vague hope that the verdict may have been different. The State submits that a proper application of the standards relating to ineffectiveness claims in general and to habeas corpus claims based on state convictions in particular would have resulted in an affirmation of the state convictions and that the federal rulings were in error.

The decision of the Fifth Circuit did not apply the proper standard in this ineffective assistance of counsel claim. The panel decision found deficient performance *per se*.[28] This substantially and improperly alters the application of the ineffective assistance of counsel standard announced by the Supreme Court

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[28] Pet. App. pp. 11-12.

of the United States in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), applicable to proceedings arising in state courts and raised in federal habeas corpus proceedings. The panel decision conflicts with and is directly contrary to the pronouncement in both *Strickland* and *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), that ineffective claims must be reviewed independently and in a case-by-case manner rather than by any *per se* or bright line rules.

The alleged deficiency was that counsel chose not to interview a particular state witness who testified about the facts of the murders. This witness, with whom respondent was having a sexual affair, testified that respondent murdered his wife, his mother-in-law, and his father-in-law (whom he called a "bully" at the trial). Upon cross-examination at trial, this witness declined to confirm that she had told respondent that his wife was cheating on him.

The standard for claims of ineffectiveness was set forth in *Strickland*. What is not as often quoted from *Strickland* are the allegations of the deficiencies of counsel in that case. The Court noted that counsel experienced a sense of hopelessness when he learned that, against his specific advice, Strickland confessed to two murders.[29] In preparing for the sentencing hearing, counsel spoke with petitioner about his

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[29] Like Sarah Robinson in the present case, the action of the defendant in *Strickland* was beyond the control of his attorney.

background and spoke on the telephone with his wife and mother, but he did not follow up and meet with them. Counsel did not seek character witnesses or a psychiatric examination, since his client gave no indication that he had psychological problems. Counsel did not seek or present evidence about his client's character or emotional state. Because counsel judged that a presentence report might prove more detrimental than helpful, as it would have included petitioner's criminal activity, he did not request that one be prepared. In support of his ineffective claim, Strickland submitted 14 affidavits from friends, neighbors, and relatives stating that they would have testified if asked to do so. He submitted a psychiatric and a psychological report stating that he, though not under the influence of extreme mental or emotional disturbance, was "chronically frustrated and depressed because of his economic dilemma" at the time. See *Strickland,* 466 U.S. at 672-675. These facts are much more egregious than the facts in the instant case, but the Supreme Court reversed the decision of the Court of Appeals in *Strickland.*

The Supreme Court of the United States noted in *Strickland* that:

> Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a

> conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that **they actually had an adverse effect on the defense**. *Strickland,* 466 U.S. at 692-693, 104 S.Ct. at 2067. [Emphasis added.]

In *Yarborough v. Gentry,* 540 U.S. 1, 8, 124 S.Ct. 1, 5-6 (2003), this Court noted that when counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through neglect. See *Strickland*, 466 U.S. at 690. Moreover, the Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.

The Supreme Court of the United States went on to note that:

> To be sure, Gentry's lawyer was no Aristotle or even Clarence Darrow. But the Ninth Circuit's conclusion – not only that his performance was deficient, but that any disagreement with that conclusion would be

> objectively unreasonable – gives too little deference to the state courts that have primary responsibility for supervising defense counsel in state criminal trials. *Yarborough,* 540 U.S. 1, 11, 124 S.Ct. 1, 7 (2003).

The panel decision noted, "If [Monahan] had interviewed her and then decided not to call her to testify, his decision might be excusable as strategic. His failure to interview her altogether, though is deficient *per se*, at least under the specific circumstances here." This analysis is flawed in at least two respects. First, Sarah Robinson was going to and did testify for the state regardless of whether or not Koon's attorney called her. Thus, by the panel's own holding, the conduct of the attorney in this case should have been excusable.

Second, the finding that trial counsel was ineffective for failing to interview Sarah Robinson fails to consider the impact this evidence would have had in the context of the state trial. Although mentioning "the specific circumstances here," the ruling failed to mention what circumstances made this case exceptional. As demonstrated by Monahan's testimony, he was well aware of the story that Robinson intended to tell at trial. Somehow, the federal courts concluded that a simple interview with this witness would have caused her to change her story at trial, a process that took post conviction counsel and federal habeas counsel over ten years of repeated interviewing and changing stories to accomplish.

The state court record is replete with references that indicate it was respondent who sabotaged his own defense. In his state appeal the Louisiana Supreme Court noted:

> [D]efendant's own testimony at trial portrayed a cold and remorseless killer. He testified as follows:
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> * * *
>
> Q. Have you ever had any bad words with [Mr. Guidry] before?
>
> A. Not real bad words. We had a few arguments.
>
> Q. How would you describe him? Was he a volatile type, jump-in-your face kind of guy?
>
> A. Yes, sir, he was.
>
> Q. He was?
>
> A. **If I had to describe him, it would be as a bully.**
>
> **Q. Mr. Guidry was a bully?**
>
> **A. Yes, sir.**
>
> **Q. He tried to bully you around?**
>
> **A. He tried to bully all his son-in-laws and his daughters around and his grandchildren.**
>
> * * *
>
> The jury also heard defendant's statement to Detective Foster of the Livingston Parish

> Sheriff's Department by cell phone that **he had killed three people in Baton Rouge and that there was "one other son-of-a-bitch" whom he would have liked to kill. This statement easily could have led the jury to conclude that only did defendant not regret killing his three victims, but only regretted not being able to kill a fourth person.**[30]

The cited facts, as found by the state courts, make this case a difficult one to say an error by an attorney in failing to interview a witness and to convince her to change her testimony at trial affected the outcome of the trial. The State maintains that a proper application of *Strickland* and its progeny results in a finding that the attorney was not at fault for the witness' testimony, nor was there any prejudice.

Thus, the finding that the jury verdicts are not reliable because of alleged attorney error is inconsistent with the facts of this case or Supreme Court precedent. Thus, the federal courts were in error when they reversed the holding of the state courts that reviewed this case.

The State of Louisiana maintains that the federal district court applied the incorrect standard to the findings of the state courts. Respondent's claims of ineffectiveness at the guilt and penalty phase are

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[30] *State v. Koon*, 96-1208 (La. 5/20/97); 704 So.2d 756, *cert. denied*, 522 U.S. 1001, 118 S.Ct. 570, 139 L.Ed.2d 410 (1997). [Emphasis added].

without merit. The federal district court's ruling to the contrary should be reversed and the state court rulings should be reinstated.

CONCLUSION

For the foregoing reasons, the State of Louisiana respectfully requests that a writ of certiorari issue to review the judgment of the lower federal courts in this matter.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-70018

WALTER J KOON

Petitioner-Appellee

v.

BURL CAIN, Warden, Louisiana State Penitentiary,

Respondent-Appellant

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:01-CV-327

(Filed May 1, 2008)

Before SMITH, WIENER, and OWEN, Circuit Judges.

PER CURIAM:*

Petitioner-Appellee Walter J. Koon petitioned the district court for writ of habeas corpus, asserting that his trial counsel, Kevin Monahan, violated his constitutional right to effective assistance of counsel during

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

both the guilt/innocence and penalty phases of his murder trial in state court. The district court granted Koon's petition, reversing and vacating his conviction on three counts of first degree murder (and thus his death sentence) and remanding to state court for a new trial. Respondent-Appellant Warden Burl Cain, on behalf of the State of Louisiana, appeals the district court's grant of habeas relief, insisting that the court erred in (1) failing to afford proper deference to the state court's decisions and rulings; (2) concluding that Koon was denied effective assistance of counsel during the guilt/innocence phase of his trial; (3) concluding that Koon was denied effective assistance of counsel during the penalty phase of his trial; and (4) denying the State's motion for a new trial.[1] We find no merit to the State's contention that the district court failed to afford proper deference to the state court's decisions and rulings. And, convinced that the district court applied the proper legal standards to the relevant facts and reached the correct conclusions, we affirm its grant of Koon's petition on the basis that he was denied effective assistance of counsel during the guilt/innocence phase of his trial.[2]

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[1] Although the State's motion in response to the district court's ruling granting Koon habeas relief was technically styled as a "motion for new trial," the State did not literally seek a new "trial" but rather reconsideration of the district court's habeas ruling.

[2] Accordingly, the question whether Koon was also denied effective assistance of counsel during the sentencing phase of his trial is moot. *See, e.g., Soffar v. Dretke,* 368 F.3d 441, 442, 480 (5th Cir. 2004) (setting aside both defendant's conviction and

(Continued on following page)

Finally, we conclude that the district court acted within its discretion when it denied the State's motion for a new trial.

I. FACTS AND PROCEEDINGS

Around noon on March 5, 1993, Koon, along with his passenger, Sarah Robinson, drove to the Baton Rouge home of his in-laws, where his estranged wife, Michelle Guidry, was staying. After parking his truck in the driveway of the Guidry residence, Koon walked to the backyard, where he shot and killed his wife before entering the home and shooting and killing her parents. After observing Koon shoot his wife, Robinson ran screaming from Koon's truck into the Guidry residence, where she hid until Koon had left the scene. Immediately following the shootings, Koon drove to his home in Livingston Parish, where he called the local authorities and turned himself in for the killings.

Koon was charged with three counts of first degree murder. He was initially represented by the Office of the Public Defender; however, after voicing his dissatisfaction with this representation, the Louisiana state court appointed Monahan, a private

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sentence because of counsel's failure to provide effective assistance during guilt/innocence phase). We emphasize, though, that our affirming of the district court's order that reversed and vacated Koon's conviction of first degree murder vacates his death sentence as well. Should Koon be retried and found guilty, he must be re-sentenced as well.

criminal defense attorney, to represent Koon jointly with the public defender. Soon thereafter, a private attorney, Denise Vinet, was substituted for the public defender as co-counsel. At the beginning of Koon's trial in March 1995, though, Monahan informed the court that Vinet wished to withdraw, stating that Vinet's assistance was not needed. Vinet also indicated that her withdrawal should not be a problem because Monahan had not asked her to do a thing on the case. The court granted Vinet's motion to withdraw, but only after Koon waived any objection. No assistant counsel was appointed to replace Vinet.

At trial, Monahan entered Koon's dual plea of not guilty and not guilty by reason of insanity. Monahan's defensive strategy centered on Koon's mental state at the time of the killings. Specifically, Monahan elected to emphasize that Koon "just had one bad week" in an effort to negate his specific intent and lessen his culpability for his actions. Monahan would introduce evidence that, by the end of the week, Koon's wife had left him; he had become ill; he had a tax lien levied against him; and he had just learned that his wife was having an affair (which, according to Koon, had been disclosed to him by Robinson while they were riding in Koon's truck en route to the Guidry residence). In addition, Monahan had been told by Koon that he was not using drugs, Xanax, or alcohol when he shot and killed the Guidrys but that he had been doing so in the early morning hours that day as well as in the preceding weeks, leading Monahan to theorize that Koon was suffering from "withdrawal"

effects at the time of the killings. According to Monahan, these detoxification effects combined with Koon's "bad week" to render him unable to tell right from wrong when he shot his estranged wife and her parents.

Monahan enlisted the help of a few medical experts to assist in his presentation of this insanity/manslaughter defense. His chief expert, Dr. Marc Zimmerman, who testified that Koon's detoxification contributed to his inability to tell right from wrong at the time of the killings, was hired by Monahan the day before Koon's trial began and had only an hour to interview Koon before testifying. Zimmerman's testimony was torn apart by the State's opposing expert, Dr. Donald Hoppe, who criticized Zimmerman's cursory interview of Koon as well as Zimmerman's failure to interview Koon's family members and close friends. Furthermore, Hoppe, a clinical psychologist who had not interviewed Koon but had reviewed the results of the MMPI test conducted by Zimmerman, ventured that Koon's test results showed that he was not remorseful; was a liar; was manipulative; and was violent. Monahan was unprepared – and, in fact, made no attempt – to counter the State's devastating rebuttal, even though it turned out that there was little in the literature to support Hoppe's broad interpretation of Koon's test results.

Koon's insanity/manslaughter defense was dealt another blow when Robinson, the lone eyewitness to the killings, whom Monahan had failed to interview prior to trial, contradicted Koon's own testimony by

denying that she had told him shortly before the killings that his wife was having an affair with one Joey Leblanc, a person Koon particularly disliked because he had been betrayed by Leblanc in the past. Robinson also contradicted Koon's testimony that he had consumed alcohol and drugs (including Xanax) the morning of the killings.

The jury convicted Koon of first degree murder on all counts and sentenced him to death. Koon appealed his conviction and sentence to the Louisiana Supreme Court on 11 different grounds, but that court affirmed.[3] Koon then moved for post-conviction relief in state court based on ineffective assistance of counsel. In anticipation of his post-conviction relief hearing, Koon requested that the court issue subpoenas directing the attendance of 33 witnesses at the hearing; however, the court limited him to two: Monahan and Vinet. Following Monahan's and Vinet's testimony, the state court denied Koon relief, concluding that Monahan "did a good job with what he had to work with."

After Koon exhausted his available state court remedies, he filed this petition for writ of habeas corpus in the United States District Court for the Middle District of Louisiana. The district court first granted Koon an opportunity to present the evidence that the state court had disallowed in its post-conviction relief proceeding. After holding a hearing

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[3] *Louisiana v. Koon*, 704 So. 2d 756 (La. 1997).

and considering evidence concerning Monahan's performance during both the guilt/innocence and penalty phases of Koon's trial, the district court granted Koon's petition, vacating his conviction and sentence and remanding to state court for a new trial. The district court concluded that Monahan's performance was constitutionally deficient during both phases because he inadequately investigated and prepared Koon's defense, which prejudiced Koon: The jury (1) could have found him guilty of a lesser offense than first degree murder, and (2) might have sentenced him to life in prison, rather than to death. In response, the State moved for a new trial, which motion was denied. The State then timely filed a notice of appeal, challenging the district court's ruling as well as its denial of the State's motion for a new trial.

II. ANALYSIS

A. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") is applicable to this proceeding because Koon's habeas petition was filed after the effective date of the AEDPA. The AEDPA specifies that federal habeas relief "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by

the Supreme Court of the United States; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[4]

The Supreme Court has held that a state court's decision that correctly identifies the governing legal rule but unreasonably applies it to the facts of a particular prisoner's case is sufficient for a federal habeas court to grant the writ.[5] For a federal court to find a state court's application of Supreme Court precedent "unreasonable," however, the state court's decision must have been more than simply incorrect or erroneous;[6] its application of federal law must have been "objectively unreasonable."[7] Moreover, the state court's findings of fact are presumed to be correct, and the federal court only reviews the facts for clear and convincing error.[8]

Having reviewed the record on appeal and the district court's lengthy and comprehensive ruling on Koon's petition for writ of habeas corpus, we conclude that the district court afforded proper deference to

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[4] 28 U.S.C. § 2254(d).

[5] *Wiggins v. Smith*, 539 U.S. 510, 520 (2003); *Bell v. Cone*, 535 U.S. 685, 694 (2002).

[6] *Wiggins*, 539 U.S. at 520; *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003).

[7] *Williams v. Taylor*, 529 U.S. 362, 409 (2000).

[8] 28 U.S.C. § 2254(e)(1).

the state court's decisions and rulings. Accordingly, we reject the State's contention to the contrary.

B. Ineffective Assistance of Counsel

The governing legal principles for Koon's claims of ineffective assistance of counsel were established in *Strickland v. Washington*.[9] To succeed on a charge of ineffective assistance of counsel in state court, a petitioner must satisfy both prongs of *Strickland's* two-part test by demonstrating that (1) counsel's performance was deficient and (2) counsel's deficient performance caused actual prejudice to the petitioner's defense.[10]

To prove deficient performance, "a petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness,"[11] under the then "prevailing professional norms."[12] In evaluating counsel's performance, the Supreme Court has long referred to the American Bar Association ("ABA") Standards for Criminal Justice as "guides to determining what is reasonable."[13] Moreover, we apply "the strong presumption that counsel performed adequately and exercised reasonable professional

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[9] 466 U.S. 668 (1984).

[10] *Id.* at 687.

[11] *Virgil v. Dretke*, 446 F.3d 598, 608 (5th Cir. 2006).

[12] *Strickland*, 466 U.S. at 688.

[13] *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Strickland*, 466 U.S. at 688.

judgment."[14] "[A] conscious and informed decision on trial tactics and strategy cannot be the basis of constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness."[15] At the same time, however, we recognize the distinction between strategic judgment calls and plain omissions,[16] and we are "not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all."[17]

To demonstrate prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[18] Stated differently, a constitutional trial error is harmful only if there is "more than a reasonable probability that it contributed to the verdict."[19]

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[14] *Virgil,* 446 F.3d at 608 (internal quotation marks omitted).

[15] *Id.* (internal quotation marks omitted).

[16] *See Lloyd v. Whitley,* 977 F.2d 149, 158 (5th Cir. 1992).

[17] *Moore v. Johnson,* 194 F.3d 586, 604 (5th Cir. 1999).

[18] *Virgil,* 446 F.3d at 611 (quoting *Strickland,* 466 U.S. at 694).

[19] *Mayabb v. Johnson,* 168 F.3d 863, 868 (5th Cir. 1999).

The district court identified four crucial mistakes by Monahan in support of its ruling that the state court's decision that Koon was not denied effective assistance of counsel during the guilt/innocence phase of his trial "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States": (1) his failure to interview Robinson before trial; (2) his waiting until one day before trial to hire Zimmerman, his mental health expert; (3) his decision to proceed alone without the aid of at least one other attorney; and (4) his failure to prepare Koon adequately to testify.[20] The district court made clear that Monahan's failure to interview Robinson, standing alone, is a constitutionally deficient performance; it highlighted his other missteps, though, to further emphasize the egregiousness of Monahan's deficient representation during the guilt/innocence phase of Koon's trial as well as the cumulative prejudicial effort of these multiple deficiencies.

We agree with the district court that Monahan's failure to interview Robinson constitutes deficient performance *per se*. Moreover, we agree that his other actions, particularly his last minute hiring of Zimmerman, exacerbate his overall deficient performance and heighten its prejudice.

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[20] The district court concluded that Monahan's failure to prepare Koon adequately resulted in Koon's testimony being perceived as cold, remorseless, and unsympathetic.

ABA Criminal Justice Standards 4-4.1(a) provides:

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

Monahan's defensive strategy centered on Koon's mental state at the time of the killings, and Robinson was the only eyewitness to them and to Koon's behavior in the hours preceding the shootings. As such, she was the only person who could speak to Koon's mental state leading up to and during the event. Monahan should have interviewed her to ascertain what she intended to say at trial, especially whether she would corroborate Koon's intended testimony about his mental state, around which Monahan's entire defense was structured. Monahan failed even to *attempt* to interview her, though, and Robinson ultimately took the stand and directly contradicted Koon's testimony that she had told him that his wife was having an affair. The prejudicial effect of this contradiction cannot be overstated because Monahan had theorized that Robinson's testimony would bolster Koon's "heat of passion" defense, not undermine

it. Furthermore, Robinson subsequently recanted her trial testimony at the federal evidentiary hearing and admitted that she had told Koon about the affair before the killings, stating further that she would have told the truth at trial if Monahan had merely approached her ahead of time and assured her that she would not be held criminally responsible for the killings.

The State advances a number of excuses for Monahan's failure to interview Robinson, e.g., it was his policy not to interview government witnesses; there was no guarantee that she would have come clean and told the truth at trial even if she had been approached by Monahan; she was not a credible witness; and so on and so forth – none of which justify his conduct. Irrespective of Robinson's credibility (or lack thereof) and whether she would have actually told the truth as she now insists, Monahan had an absolute obligation to interview her as the only eyewitness to the crime: Her testimony was crucial to Monahan's defensive theory. If he had interviewed her and then decided not to call her to testify, his decision might be excusable as strategic.[21] His failure to interview her altogether, though, is deficient *per se,* at least under the specific circumstances present here.[22]

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[21] *Soffar v. Dretke,* 368 F.3d 441, 474-75 (quoting *Anderson v. Johnson,* 338 F.3d 382, 392 (5th Cir. 2003)).

[22] *Id.* at 471-76.

Monahan's decision not to hire Zimmerman, his primary mental health expert, until *one day* before trial exacerbates his overall deficient performance. Monahan came up with the detoxification facet of the mental health defense because Koon had told him that he was not using drugs or alcohol when he shot his wife and her parents (Koon later revealed, during the federal evidentiary hearing, that he was in fact using at the time). Zimmerman was able to conduct a few tests on Koon, but only met with him for *one hour* and could not consult with any of his family members or friends before testifying. The State's opposing expert, Hoppe, severely undermined Zimmerman's testimony, highlighting the limited time and information available to Zimmerman. This rebuttal testimony went uncontested by Monahan. In fact, Zimmerman was not even present for Hoppe's testimony, as Monahan had failed to ensure that Zimmerman was on hand to assist Monahan in cross-examination. At the federal evidentiary hearing, Koon's experts testified that Zimmerman had insufficient time to develop a complete psychological history and insufficient information on which to base an opinion of Koon's mental state at the time of the killings, which left Zimmerman's testimony vulnerable to attack and resulted in severe damage to the detoxification aspect of Koon's mental health defense.

The State attempts to make much of the fact that Koon's experts at the federal evidentiary hearing had the benefit of basing their testimony on Koon's revelation that he actually had been using drugs and

alcohol at the time of the killings, insisting that Koon's self-serving change in testimony cannot serve as the basis for arguing that Monahan's assistance was ineffective. Even if we acknowledge that Koon's defense would have been better served if he had admitted his drug and alcohol use, and even if we concede that Koon is solely to blame for the detoxification theory employed by Monahan, we still must evaluate the actual execution and quality of the defense as presented. And, it is apparent that this aspect of Koon's defense, predicated as it was on the effects of withdrawal, was hamstrung by Monahan's failure to hire Zimmerman until the eve of trial. The state court had granted Monahan the authority and funds to hire a mental health expert nearly a year before trial, yet he procrastinated until the last minute. Not only did Monahan make a questionable decision to pursue a detoxification defense on his own (without first consulting a medical professional and substantiating his theory), but he then severely limited the effectiveness of even that questionable defense by enlisting an expert who was not given even minimally sufficient time to gather information in support of his opinions.

Considering Monahan's failure to interview Robinson and his botched handling of Zimmerman, together with his other deficiencies identified by the district court, we see as inescapable the conclusion that Monahan's performance was deficient during the guilt/innocence phase of Koon's trial. Equally inescapable is the conclusion that Koon was prejudiced by

Monahan's deficient performance: There is a reasonable probability that the jury would have convicted Koon of a lesser offense than first degree murder if Monahan's performance had not been deficient.[23]

If Monahan had interviewed Robinson before trial, she may have told the truth instead of controverting Koon's testimony regarding his mental state at the time of the killings. It follows that the jury could have and likely would have given greater consideration to the "heat of passion" aspect of Koon's defense. If, on the other hand, Robinson had continued to insist on denying that she had told Koon about his wife's affair after Monahan interviewed her, he would have been aware of Robinson's intended testimony and could have adjusted his defensive strategy accordingly and mitigated the damaging effects of Robinson's testimony. Furthermore, if Zimmerman had been retained a reasonable time in advance of trial, he would have had plenty of time to evaluate Koon and interview his friends and family. That way, Zimmerman could have formulated a more informed opinion on Koon's mental state and been prepared to support and defend that opinion on cross-examination. In short, if Monahan's performance had not been deficient and prejudicial, it is probable that Koon's level of culpability would have been reduced in the eyes of the jury. These failings by Monahan, which subverted both the insanity and manslaughter

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[23] *See* LA. REV. STAT. ANN. §§ 14:30.1(A), 14:31(A)(1).

aspects of Koon's defense, undermine any confidence we might otherwise have in the propriety of his first degree murder conviction. Based on the foregoing considerations, the state court's ruling that Koon was not denied effective assistance of counsel during the guilt/innocence phase of his trial is objectively unreasonable.

C. Motion for New Trial

Before we will disturb a district court's ruling denying a motion for a new trial, we must find that the district court clearly abused its discretion.[24] Following the district court's grant of Koon's petition, the State filed its motion based on Monahan's post-federal hearing revelation that the true reason he did not interview Robinson before Koon's trial is because Koon had told him that the murders were premeditated and that Robinson was a co-conspirator. The State insists that this newly discovered information reveals that Monahan's decision not to interview Robinson was strategic, warranting a new trial under Federal Rule of Civil Procedure 59.[25]

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[24] *Diaz v. Methodist Hosp.*, 46 F.3d 492, 495 (5th Cir. 1995).

[25] A motion for a new trial on the basis of newly discovered evidence requires the movant to prove the following: (1) the evidence is newly discovered and was unknown to the movant at the time of the trial; (2) the movant's failure to detect the evidence was not due to a lack of diligence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence would probably produce a different outcome at a new

(Continued on following page)

We reject the State's contention because Monahan's disclosure, even if true,[26] does not absolve him of his failure to interview Robinson. Again, there is a critical distinction between, on the one hand, failing even to attempt to interview the lone eyewitness to a crime, whose testimony is critical to the defensive theory presented, and, on the other hand, strategically deciding not to call that person to testify based on the results of such an interview. Accordingly (and without determining whether the State met the other requirements for a new trial), this newly discovered evidence would not produce a different habeas outcome even if a new trial were held.[27] The district court did not abuse its discretion in denying the State's motion.

III. CONCLUSION

We affirm the district court's holding that Monahan failed to provide effective assistance of counsel to Koon during the guilt/innocence phase of his trial, and that the state court's ruling to the contrary is objectively unreasonable. We further hold that the district court afforded proper deference to

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trial. *See United States v. Pena*, 949 F.2d 751, 758 (5th Cir. 1991).

[26] The district court observed that it did not find Monahan to be credible.

[27] Failure to prove any one of the four elements justifies the denial of a motion for new trial. *United States v. Freeman*, 77 F.3d 812, 817 (5th Cir. 1996).

the state court's decisions and rulings in reaching its decision, and that it did not abuse its discretion in denying the State's motion for a new trial. Accordingly, we affirm the district court's grant of Koon's petition for writ of habeas corpus, reversing and vacating his conviction and death sentence and remanding his case to state court for a new trial (and re-sentencing if convicted). AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

WALTER KOON
VERSUS
BURL CAIN

CIVIL ACTION
NO.: 01-327

RULING ON MOTION FOR NEW TRIAL

(Filed Apr. 11, 2007)

The matter before the court is a motion for new trial (doc. 112) pursuant to FED. R. CIV. P. 59 filed by the respondent, Burl Cain. The respondent is represented by the State of Louisiana. The petitioner, Walter Koon ("Koon"), opposes the motion (doc. 117). The State has filed a reply (doc. 118). Oral argument is not needed.

1. Background

On February 1, 2007, this court sustained Koon's petition for a writ of habeas corpus (doc. 111). The court granted the writ and ordered that Koon's murder convictions and respective sentences of death be vacated. The court ordered the cause remanded to the Louisiana state court for a new trial. Specifically, the court ruled that Koon's trial counsel, Kevin Monahan ("Monahan"), provided "ineffective assistance of counsel," as that term is contemplated by the Sixth Amendment of the United States Constitution.

In its ruling, the court, in relying on *Soffar v. Dretke*, 368 F.3d 441 (5th Cir. 2004) and the ABA Standards of Criminal Justice in place at the time of Koon's trial, ruled that Monahan's failure to attempt to interview the sole eyewitness to the killings (Sarah Robinson) constituted constitutionally deficient performance. The court, however, did not only rely on Monahan's failure to interview Robinson in finding that his performance was constitutionally deficient. The court also relied on the facts that Monahan: (1) presented a mental-health/status defense at trial, yet only hired his chief expert witness on the issue one day before trial; (2) failed to use the assistance of co-counsel; and (3) failed to adequately prepare Koon for testimony at trial. In addition, the court found Monahan's performance to be constitutionally deficient with respect to representation of Koon during the penalty phase of the trial. The court found that Monahan essentially failed to put on a case in mitigation of death during the penalty phase.

On February 5, 2007, the State filed a motion for new trial. The State attached as an exhibit a copy of an affidavit by Monahan. The affidavit is apparently a transcript of an interview Monahan gave to counsel for the State. In the interview, Monahan gave a new explanation as to why he did not interview Robinson during his preparation of Koon's murder trial. Monahan's explanation was that Koon admitted that the killings were premeditated between Robinson and himself, and that it would have hurt his defense to interview Robinson. Monahan's affidavit puts forth

that after speaking with Koon, he learned that Koon and Robinson planned to kill Koon's estranged wife, Michelle Guidry, and then kill Guidry's boyfriend. Monahan also states in his affidavit that he did not interview Robinson because of ethical concerns. He stated, "She'd need her own lawyers. I was going to create more problems for her by meeting with her and problems for myself and problems for my case and I felt it just better off I leave her alone."

At the federal hearing, Monahan never asserted these reasons when asked why he failed to interview Robinson. The following exchange took place at the federal hearing:

> [Counsel for Koon]: Before the trial began, did you ever speak to Sarah Robinson?
>
> [Monahan]: No, I did not interview Sarah Robinson.
>
> [Counsel for Koon]: Why didn't you interview Ms. Robinson?
>
> [Monahan]: I've never interviewed a state's witness. I have never really gone and sought out a state's key witness and interviewed them.
>
> [Counsel for Koon]: Why not?
>
> [Monahan]: I just felt that she wasn't going to give me anything that would help. I knew that she would probably say through what she told the newspaper and from some other report, that she didn't know he was going to do that. Because if she got up on the

> stand and said that she knew he was going to do that, then she was a principal. And I knew that she would give me that this was just a spur-of-the-moment thing; that he snapped. And I didn't interview her.
>
> What I did do is I didn't have her sequestered at the opening statement, and she sat in the courtroom during the opening statement and she heard my opening statement. And I felt that if she heard those facts that I was saying, that she would help [Koon] and say that she did tell him that [Guirdry] was having an affair and that she was supplying the drugs.[1]

Monahan now admits that his testimony to this court at the federal hearing was "cagey." According to Monahan, he did not testify to the "new" reasons for failing to interview Robinson because he wanted to help Koon by holding back on the fact that Koon told him that the killings were premeditated. Although Monahan prefers the word "cagey," the court view his testimony and his actions to be more akin to perjury and fraud on the court. Recognizing that Monahan's affidavit attempts to give a new explanation as to why he did not interview Robinson, the State argues that Monahan's affidavit constitutes newly discovered evidence and warrants a rehearing on Koon's petition. The court is concerned with the State's position. It is noted that the State was aware on at least two prior

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[1] Tr. Feb. 16, 2006, at pp. 110-11.

occasions, Monahan testified under oath in contradiction to the statements he now gives in his sworn affidavit.

II. Analysis

FED. R. CIV. P. 59(a) states that a new trial may be granted "in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States." The State pursues a theory that a new trial is warranted on the basis of newly discovered evidence. A motion for new trial on the basis of newly discovered evidence requires the movant to prove the following: (1) the evidence is newly discovered and was unknown to the movant at the time of the trial; (2) the movant's failure to detect the evidence was not due to a lack of diligence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence would probably produce a different outcome at a new trial. *See States v. Pena*, 949 F.2d 751, 758 (5th Cir. 1991).

Failure to prove any one of the four elements results in a denial of the motion for new trial. *United States v. Freeman*, 77 F.3d 812, 817 (5th Cir. 1996). "Motions for a new trial based on newly discovered evidence are 'disfavored by the courts and therefore are viewed with great caution.'" *Id.* (*quoting United States v. Fowler*, 735 F.2d 823, 830 (5th Cir. 1984)).

As to the fourth element, the court considers whether the "new evidence" would probably have

changed the outcome of the trial. *Diaz v. Methodist Hosp.*, 46 F.3d 492, 495 (5th Cir. 1995).[2] The court does not agree with the State that Monahan's new reason for not interviewing Robinson would have changed the outcome of the court's prior ruling. The ABA Standards of Criminal Justice at the time of Koon's trial provided,

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. . . .

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[2] The court assumes, without finding, that Monahan's affidavit is newly discovered evidence. The court has serious reservations, however, that the affidavit is truly "newly discovered." The Fifth Circuit requires the moving party to show that the failure to detect evidence was not due to a lack of due diligence in order to consider evidence as "newly discovered." *United States v. Villarreal*, 324 F.3d 319, 325 (5th Cir. 2003). "If the defense failed to appreciate the significance of the evidence, that failure constituted a lack of diligence." *Id. (citing United States v. Jaramillo*, 42 F.3d 920, 925 (5th Cir. 1995).

There is an issue as to whether the State failed to appreciate the significance of Monahan's failure to interview Robinson, and to further explore what Monahan meant by his now admitted "cagey" answer that he "just felt that [Robinson] wasn't going to give [him] anything that would help." Tr. Feb. 16, 2006, at pg. 110. In this case, the State was aware that Robinson's testimony during the guilt phase of the trial would be explored during the federal evidentiary hearing. (Doc. 24). The State was well aware that Robinson was the only eyewitness to the crimes at issue. It can hardly be argued that the State did not know that Monahan's investigation of Robinson was of vital importance to Koon's claim of ineffective assistance of counsel.

> The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt. . . .

ABA Standards of Criminal Justice, 4-4.1. As the Fifth Circuit has stated, "an actual failure to investigate cannot be excused by a hypothetical decision not to use the unknown results." *Soffar,* 368 F.3d at 473-74.

Monahan's new reason for not investigating Robinson's story is based *solely* on what Koon allegedly told him. Simply relying on Koon's statements as a basis for refusing to attempt to interview the sole eyewitness to the crime is not sound trial strategy, but rather is constitutionally deficient performance. ABA Standards of Criminal Justice, 4-4.1. The court finds Koon's expert witness, Phyllis Mann, to be credible, and it is persuaded by her affidavit. Ms. Mann states,

> Any attorney defending Mr. Koon in connection with these homicides would have to prepare to confront or present the testimony of Ms. Robinson at Mr. Koon's trial. In order to prepare to either confront or present that testimony, it would be necessary to at a minimum attempt to interview Ms. Robinson to learn what she knew about the events preceding, during, and following the homicides.
>
> Assuming Mr. Monahan's affidavit to be true, . . . it is necessary for the defense attorney to learn whether the sole eyewitness corroborates the information provided by the

> client. . . . Further, it was incumbent upon the trial attorney to learn whether Ms. Robinson corroborated or refuted the information allegedly provided by Mr. Koon because this could have shed light on Mr. Koon's mental status and informed the defense to be presented at both the guilt and penalty phases of his first degree murder trial. If Ms. Robinson confirmed that the information provided by Mr. Koon was correct, then the trial attorney would have wanted to determine the circumstances under which any such plan was formed.[3]

It was Monahan's failure to *attempt* to interview Robinson that this court relied on in determining that Monahan's performance was deficient. Doc. 111, pg. 21. Had Monahan taken the time to fully investigate the case, he would have learned that Robinson was willing to cooperate with his theory of defense. At the federal hearing, Robinson testified that Koon snapped after she told him that Guidry was having an affair. The court has already determined Robinson to be a credible witness. While it is true that Robinson has changed her story in the past, the court carefully observed her demeanor and listened to her testimony. The court believes her testimony at the federal hearing was true.

Monahan's affidavit, on the other hand, comes just four days after the court found his representation

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[3] Koon's Exhibit, Affidavit of Phyllis Mann, at pg. 2.

constitutionally deficient. His affidavit is highly suspect, and the court in fact finds that his affidavit is not credible. *See Freeman,* 72 F.3d at 818 (denying a motion for new trial based on newly discovered evidence on the basis of "questionable credibility" of the allegedly new evidence).

Monahan now states that Koon told him that he and Robinson planned the killings, but Monahan's prior testimony has been quite different. At the state habeas hearing, Monahan testified that he "adopted [his theory of defense] based upon what [Koon] told him."[4] His theory of defense was that Koon acted in a heat of passion with no specific intent to kill. Monahan testified that Koon "in no way, shape or form had the intent of that when he went over there – to kill her."[5] He testified that when he first met Koon, Koon admitted to the killings, but "he denied [the killings] were intentional. . . ."[6] The court further notes that Monahan previously testified that at Koon's trial, he hoped that Robinson would hear his opening statement and then "get up there and tell the truth." According to Monahan, if Robinson "would have told the truth," that "would have corroborated the manslaughter and the meltdown, and that would have helped the case."

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[4] S.R. Vol. 1, Tab 28, pg. 20.

[5] *Id.* at pg. 21.

[6] *Id.* at pg. 43.

The most compelling reason for finding Monahan's affidavit to not be credible, however, comes from the following testimony he gave to the state habeas court,

> I think there is information about with Sarah Robinson as to, you hear on the back of the tape she's saying [Koon]'s gone to Dealer Wrecker and I think [Guidry's] boyfriend worked at Dealer Wrecker and I think it has come out later that they actually had a plan to go over there and do the killing and then go to Dealer's Wrecker and kill the boyfriend, and then go out of town. *So, you know, I didn't have that information at the time. This is what I learned later.*[7]

This shows that Monahan did not know, at least before Koon's trial, that there was any alleged conspiracy between Koon and Robinson to murder Guidry. Therefore the court finds that Monahan had no knowledge, while representing Koon, that Koon conspired with Robinson to commit the crimes.

The law pursuant to *Soffar* and the ABA standards required Monahan to interview Robinson and investigate her version of the events. Monahan's obligations did not change even if he was aware of an alleged conspiracy between Robinson and Koon. His failure to take the elementary step of interviewing the sole eyewitness constituted ineffective assistance

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[7] *Id.* at pg. 48 (emphasis added).

of counsel. *Soffar,* 368 F.3d at 473-74; ABA Standards of Criminal Justice, 4-4.1.

Finally, the court notes that it was not solely Monahan's failure to investigate Robinson's story that constituted ineffective assistance of counsel. In addition, Monahan hired his chief expert witness on the issues of mental health and mental status only one day before trial. Monahan's theory of defense focused on Koon's mental state at the time of the killings – that Koon was in a drug withdrawal process and that he "snapped" when learning of Guidry's affair. The court need not restate to what effect the late hiring had on Koon's defense. It suffices to say that Monahan's affidavit presents nothing new to question the court's ruling on these issues.

Nonetheless, the State argues that if Monahan allowed Koon to be interviewed by a mental health expert at a time that was well in advance of the trial, the possibility existed that Koon would reveal to the expert that the killings were premeditated. The result, the State argues, could have been that the admission would be included in an expert report that would be discoverable by the State.

The State's reasoning is based on pure speculation. Defense counsel could conceivably be worried in every case requiring mental examination of the defendant that the defendant may blurt out a confession to the examining doctor. This speculative worry is not a sufficient reason for failing to adequately investigate a mental health defense. As Dr. Seiden

testified at the federal hearing, it was all but impossible for Monahan to effectively present a mental health defense without timely employing his expert. The State's argument is therefore rejected.

III. Conclusion

The court has previously ruled that Monahan provided ineffective assistance of counsel. The State has failed to persuade the court to revisit the issue.

It is hereby ordered that the State's motion for new trial (doc. 112) is DENIED. Baton Rouge, Louisiana, April 11th, 2007.

/s/ James J. Brady
JAMES J. BRADY,
DISTRICT JUDGE
MIDDLE DISTRICT
OF LOUISIANA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

WALTER J. KOON
VERSUS
BURL CAIN

CIVIL ACTION
NO.: 01-327

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

(Filed Feb. 1, 2007)

The matter before the court is a petition by Walter J. Koon ("Koon"), a Louisiana state prisoner sentenced to death, seeking a writ of habeas corpus (doc. 1), pursuant to 28 U.S.C. §2254. He claims three separate grounds for relief. Under his first two claims, Koon argues that his trial counsel provided ineffective assistance, as that term is construed under U.S. Const. Amends. VI, XIV. Koon claims that his trial counsel was ineffective in representing him during both the guilt phase and the penalty phase of his jury trial. His third claim is that a new trial is warranted on the basis of an erroneously admitted confession.

The respondent is the warden of the prison where Koon is presently incarcerated, the Louisiana State Penitentiary in Angola, Louisiana. He is represented by the State of Louisiana ("State").

Koon was convicted of first-degree murder and sentenced to death. On direct appeal, the Louisiana Supreme Court affirmed the judgment and sentence.

State v. Koon, 704 So. 2d 756 (La. 1997), *cert. denied, Koon v. Louisiana,* 522 U.S. 1001 (1997). Koon's motion for post-conviction relief was denied by the state post-conviction court on March 21, 2000. His petition for habeas relief in the Louisiana Supreme Court was also denied, without any written reasons. *State ex rel. Koon v. State,* 781 So. 2d 1258 (La. 2001). After exhausting his state remedies, Koon's petition is now ripe for review. 28 U.S.C. §2254. A federal evidentiary hearing was held by the court on February 14-16 and March 6, 2006.

Factual Background

At approximately noon on March 5, 1993, Koon and a passenger, Sarah Robinson,[1] drove to the Baton Rouge home of his in-laws where his wife, Michelle Guidry Koon, was staying. Armed with a semi-automatic pistol, Koon parked his truck in the driveway, walked to the backyard, pulled the gun from his waistband and shot his wife two times, killing her. Robinson then jumped out of the truck and ran into the Guidry home, yelling that Koon had shot Michelle. As Mrs. Guidry attempted to dial 911, Koon entered the Guidry residence and shot her at close range. She died a few moments thereafter. Koon then

[1] Sarah Robinson's name has since changed to Sarah Garcia. For purposes of ease of discussion, and reference to the state record, her name will be maintained as Sarah Robinson throughout this ruling. The court intends no disrespect to Ms. Garcia.

shot Mr. Guidry twice in the chest and then after he had fallen, moved closer to Mr. Guidry and shot him twice more at close range, killing him.

Koon left the Guidry home and drove directly to his residence in Livingston Parish, Louisiana. From there he contacted the Livingston Parish Sheriff's Office and told Detective Kearney Foster that he had just killed three people in Baton Rouge. The Livingston Parish police officers arrested him at his home without incident.

Koon was indicted by an East Baton Rouge Parish grand jury on three counts of first-degree murder for killing his estranged wife, Michelle Guidry Koon, and her parents, Felicie and Richard Guidry, in violation of La. R.S. 14:30. Following trial by jury, Koon was found guilty on three counts of first-degree murder and sentenced to death on each count. After exhausting all state remedies, Koon now submits an application for a writ of habeas corpus.

State Habeas Hearing

Koon's state post-conviction hearing was held on March 21, 2000. Prior to the hearing, Koon's post-conviction counsel requested that the clerk of the court for the 19th Judicial District issue subpoenas directing the attendance of 33 witnesses at the hearing. On March 9, 2000, counsel for Koon received a call from the state court informing him that the judge was not allowing the issuance of the requested subpoenas – except for two, namely Koon's trial counsels,

Kevin Monahan and Denise Vinet. On March 20, 2000, Koon, through his post-conviction counsel, filed with the Louisiana Supreme Court an application for writs seeking review of the state trial court's denial of the issuance of subpoenas. The Louisiana Supreme Court denied the writ to stay the March 21, 2000 evidentiary hearing. *State ex rel. Koon v. Cain,* 760 So. 2d 308 (La. 2000).

At the state post-conviction hearing, the court refused to allow Koon to call any of the witnesses except for his trial counsels. At the outset of the hearing, the state court ruled,

> Well, my thought process was that, basically, today we would limit it to the ineffective assistance of counsel claim and have Mr. Monahan and Mrs. – uh – Vinet. If at some point, I after hearing that evidence, decide that perhaps there was ineffective assistance of counsel or not, then I'm going to determine whether or not we're going to proceed to the next step, which would be calling all of those witnesses that they've talked about. I don't want to have to do all of that yet. Let's see where we stand after today's hearing.

In accordance with the state court's ruling, Koon was only able to call two witnesses, namely Monahan and Vinet.[2]

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[2] As will be discussed *infra,* Ms. Vinet was appointed as co-counsel to assist Mr. Monahan in the defense of Koon's case. The court notes, however, that Ms. Vinet did absolutely nothing to

(Continued on following page)

Following the testimony of Monahan and Vinet, the state court rejected Koon's ineffective assistance of counsel claim, as well as all other claims, concluding that Monahan was prepared for trial and "did a good job with what he had to work with." With regard to the claim of Monahan's failure to investigate the penalty phase, the court acknowledged that "that is probably the biggest question that I have in this." The court went on to say, "[m]aybe had there been another lawyer more testimony might have been presented, maybe, not." The court noted the existence of affidavits conflicting with Monahan's testimony that Koon's brothers and an uncle refused to testify at the penalty phase. However, the court supported its order denying Koon the right to call additional witnesses by stating, "I don't know if at trial they [Koon's witnesses] would have [testified in Koon's favor]. . . . "

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assist in the preparation of Koon's case because Mr. Monahan did not ask her to do anything. She simply did not work on Koon's case. State Record at Appdx. to Vol. 1, §28 at 7. Therefore Ms. Vinet had no first-hand knowledge as to what Mr. Monahan did or did not do to prepare Koon's defense. Accordingly, the court can only conclude that Koon was in effect limited to presenting only one witness, Mr. Monahan, on the issue of ineffective assistance of counsel at the state habeas hearing. The transcript to that hearing is evidence of this, as none of Ms. Vinet's testimony was directed to the issue of ineffective assistance of counsel by Mr. Monahan – because, of course, she had no first-hand knowledge as to that issue. State Record at Appdx. to Vol. 1, §28 at 7-14.

Scope of Federal Habeas Review

As a result of the state court's actions, this court granted Ryan an opportunity to present the evidence that the state court refused to hear (doc. 20). Review of the federal evidentiary hearing transcripts shows that neither the parties, nor the court, limited the testimony to penalty phase issues. Testimony was also had relative to whether Ryan received ineffective assistance of counsel during the guilt phase of his trial (see doc. 24). At a status conference on January 17, 2001, both parties were instructed that the court would consider Ryan's claim of ineffective assistance as it relates to both the guilt phase and the penalty phase of his trial. Neither party objected to the court's assertion that it had review power over both guilt phase and penalty phase claims of ineffective assistance of counsel (doc. 110).

Standard of Review

The court proceeds by addressing the standard of review applicable to cases seeking habeas relief. The Antiterrorism and Effective Death Penalty Act ("AEDPA") is applicable to this proceeding as Ryan's habeas corpus petition was filed after the effective date of the AEDPA. See Lindh v. Murphy, 521 U.S. 320 (1997); Hunter v. Johnson, 131 F.3d 956, 959-59 (11th Cir. 1997). As amended in 1996 by the AEDPA, 28 U.S.C. §2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Supreme Court has held that a state court decision that correctly identifies the governing legal rule but unreasonably applies it to the facts of a particular prisoner's case is enough for a federal habeas court to grant the writ. Wiggins v. Smith, 539 U.S. 510, 520 (2003); Bell v. Cone, 535 U.S. 685, 694 (2002). However, "[i]t is not for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable' the state court's decision must have been more than incorrect or erroneous. Wiggins, 539 U.S. at 520; Lockyer v. Andrade, 538 U.S. 63, 75 (2003). The state court's application of federal law must have been "objectively unreasonable." Williams v. Taylor, 529 U.S. 362, 409 (2000).

Moreover, the state court's findings of facts are presumed to be correct, and the court only reviews the facts for clear and convincing error. 28 U.S.C. §2254(e)(1). Nevertheless, the Supreme Court stated in *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003):

> [e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by [the] AEDPA, conclude that the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.

537 U.S. at 340. The Fifth Circuit has stated that "[a]n evidentiary hearing [in federal court] is not an exercise in futility just because §2254(e)(2) and (e)(1) require deference." *Valdez v. Cockrell*, 274 F.3d 941, 952. Thus, while "[t]he standard [of review of state court decisions] is demanding[,] [it is] not insurmountable." *Miller-El v. Dretke*, 125 S.Ct. 2317, 2325 (2005).

Merits

1. Ineffective Assistance During the Guilt Phase

At trial, Kunz was represented by a court-appointed attorney, Kevin Monahan ("Monahan"). As Kunz's application for habeas relief claims ineffective assistance of counsel by Monahan with respect to

both the guilt phase and the penalty phase of his trial, this court will address both in turn.

A. Findings of Fact as to Ineffective Assistance-Guilt Phase

On April 28, 1993, the state trial court appointed Monahan as counsel of record for Kuna along with the Office of the Public Defender as co-counsel. By October 1993, a private attorney, Denise Viani ("Viani") was substituted for the public defender as co-counsel for Kuna. Prior to the appointment of Monahan, the public defender had requested the appointment of a sanity commission to examine Kuna. When granting the motion, the trial court appointed me Dr. P.A. Silva to the sanity commission. In May of 1993, Dr. Silva confirmed that Kuna was competent to stand trial. The trial court found Kuna likewise competent on the basis of the sanity commission's reports and recommendations. Thereafter, Monahan withdrew Kuna's former not guilty plea and entered the dual plea of not guilty and not guilty by reason of insanity.

In February of 1994, nearly a year before Kuna's trial, Monahan motioned the court for authority to retain a psychiatrist for mental examination of his client, for appointment of an investigator, and for money to hire an expert to assist in the preparation of the case. On September 30, 1994, the trial court granted Monahan's request for funds to hire me Dr. Cesar. However, Monahan never hired Dr. Cesar as an expert witness. By March 1995, Monahan had yet

to hire the expert services of a psychologist or psychiatrist, even though his theory of defense focused on Kwan's mental state at the time of the killings. Monahan finally retained Dr. Marc Zimmerman, on March 5, 1996 – one day before Kwan's murder trial was set to begin – as an expert witness.

1. Withdrawal of Monahan's Co-Counsel

On Monday March 6, 1996, the trial court called the case and motions were heard. On March 7, the case was again called for trial, and at that time, Monahan informed the court that his co-counsel, Viret, no longer wished to participate in the case, and that she sought to withdraw. Monahan informed the court that he did not need Viret's assistance, and he was prepared to try the case alone. On March 8, Viret appeared in court and told the trial court that she did not think her withdrawal would be a problem as she "had never been asked to do a thing on this case." The trial court sustained Viret's motion to withdraw, but only after Kwan voluntarily waived any objections. Monahan was of the view that only one attorney was necessary to defend a capital case, and that he felt confident in his ability to handle the case on his own.

At the federal evidentiary hearing, Kwan's expert witness Ms. Phyllis Mann informed that at the time of Kwan's trial, the American Bar Association ("ABA") and Louisiana Supreme Court Rule 31 required that a minimum of two attorneys should be appointed on a capital case. According to Ms. Mann, two attorneys

should work together in investigating and preparing the case and developing strategies about what defenses can be presented at both phases of the capital trial, even though one is typically responsible for the guilt phase and the other is responsible for the penalty phase. Ms. Munn stated that in the beginning, "you want to explore every possibility so that, at the end, you can present what is truthful, what is within the law, and what is effective." She further stated that these methods of providing a defense in a capital case have been longstanding and were in effect by the time of Kwan's trial. The court finds Ms. Munn very credible and her reasoning compelling, especially in light of the paucity of investigation undertaken by Monahan as set forth more fully infra.

2. Monahan's Use of the Mental Health Expert

On the first day of jury selection, March 7, Monahan for the first time filed a notice of intent to introduce testimony relating to mental disease or defect or other condition bearing on whether Kwan had the mental state required for the offense charged. During voir dire, Monahan stressed to the venire panel the elements of an insanity defense and read to the panel the statutory mitigating factors under Louisiana law. The jury was selected on March 11, and on the first day of testimony, March 13, the court issued an order that Dr. Zimmerman "release unto th[e] court the results and corresponding written reports of all psychiatric examinations conducted by

him on the defendant," including MMPI and academic testing.

Monahan stressed his mental disease or defect theory of defense to the jury during his opening statement. He stated that

> *[t]he evidence is going to show that [Koon] had not had anything to drink th[e] morning [of the killings] and he had not had any prescription drugs that morning. But that it's that withdrawal process. . . . The experts will tell you that that withdrawal process caused the heightened anxiety. That withdrawal process is also a drug condition that can be used to negate specific intent. So the drug condition is the withdrawal process you're going to hear about. It goes with the insanity defense. To exempt criminal responsibility, if they prove specific intent and the act, but the drug condition can also be used to negate specific intent.*

Monahan admitted that he came up with this theory of defense solely from talking to Koon about the facts of the case. As Monahan testified, his theory of defense was basically that Koon "just had one bad week, beginning with the Friday afternoon, which was the week before the actual murder," during which he ingested Xanax and other drugs with Sarah Robinson – the lone eyewitness to the murders. At the end of the week, Koon had not only lost his wife, was sick, and had a tax lien, but Robinson also told him that his wife was having an affair with one Joey LeBlanc and that "he snapped." Monahan's plan was

to pitch to the jury that the murders "w[ere] a heat-of-passion-type of thing, plus fueled by the fact that [Koon] was in some sort of withdrawal from all chemicals that he had been ingesting." Due to the withdrawal of drugs Koon was going through, Monahan asserted his defense as being that Koon did not know right from wrong at the time of the killings. According to Monahan, he was going to pursue this defense regardless of whether his primary expert witness, Dr. Zimmerman, would say that Koon was competent enough to distinguish right from wrong.

Dr. Zimmerman was Koon's chief expert witness. While Dr. Zimmerman administered several tests on Koon, he did not consult with any family members or other collateral sources in making his diagnosis. This was because Monahan, although intending to pursue a defense of mental disease or defect, did not hire his chief expert until one day before Koon's trial. Therefore, Dr. Zimmerman had extremely limited time to adequately examine Koon. In fact, Dr. Zimmerman spent just over an hour interviewing Koon on the day before the trial. With such limited information, he concluded that Koon had an addictive personality and had some mild forms of brain dysfunction. He further testified that alcohol and drug abuse constitutes a disease, and that on the day before the killings, Koon had his usual amount of ten to fourteen Xanax and a half case of beer, and finally took some Xanax and a

couple of beers at 2:00 a.m. on the day of the killings.[1] *According to Dr. Zimmerman, Koon displayed symptoms at the time of the killings which were typical of depersonalization, one of the major symptoms of detoxification. With regard to the impact of detoxification on Koon's ability to distinguish right from wrong, Dr. Zimmerman stated, "[t]hat part of the brain that we use for that [was] less functional" in Koon's case. In terms of psychological probability, Dr. Zimmerman testified that it was more probable than not that the detoxifying effect going on in Koon's brain affected his ability to determine right from wrong.*

At the federal evidentiary hearing, Koon's mental health experts testified, without contradiction, that because Monahan failed to employ the services of a mental health expert until the day before his murder trial, the result was that Dr. Zimmerman (1) had insufficient time to develop a complete psychological history of Koon; (2) had insufficient information, lacking information from sources collateral to Koon, upon which to base an opinion as to Koon's mental state at the time of the crime; (3) was in error in many significant respects, including his diagnosis of a non-existent psychological disorder; and (4) failed to elaborate adequately on the effect of substance abuse

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[1] *While Koon denied taking any alcohol or Xanax on the day of the killings, he did admit to taking about four Xanax and two beers at approximately 2:00 a.m. in the early morning hours of that day. State Record at Vol. IX, at 2056, 2058, 2060.*

on Kuon's behavior. According to expert witness Dr. Seiden,

> [i]f your defense is a mental health defense, you're using mental status defense as your primary area of defense, your primary expert should be a mental status or mental health expert. And that person needs to be hired more than a day ahead of time to work with you as an attorney.

The court believes Kuon's uncontroverted evidence on this issue, as the mental health experts testifying at the federal habeas hearing were very credible.

As would be expected, the State at trial called one Dr. Donald Hoppe to rebut Dr. Zimmerman's testimony. Because of Monahan's lack of preparation for the trial of a mental health defense and his last minute hiring of Dr. Zimmerman, what little mental health testimony was presented in support of Kuon's defense was attacked to a devastating level. Dr. Hoppe criticized Dr. Zimmerman for not interviewing Kuon for longer than an hour and for not getting corroborating data from collateral sources. Monahan was completely unprepared to address Dr. Hoppe's testimony. After Dr. Hoppe testified, Monahan made a phone call to Dr. Zimmerman for some guidance. However, Monahan never thought it necessary to request a surrebuttal or to call Dr. Zimmerman during the penalty phase to rebut the damaging testimony.

Ms. Mann testified at the federal hearing that Dr. Hoppe's testimony should not have remained unchallenged. She explained that "[t]here was no reason why Mr. Monahan's expert wasn't sitting in the room during Dr. Hoppe's testimony. There was no reason why he wasn't prepared to refute that." As Ms. Mann explained regarding Monahan's ineffective use of experts,

> [defense attorneys] don't know everything. We hire experts to teach us about this so that we can decide what the defense is. We don't just pick one, show up at court, and then, in the middle of trial, start hiring experts til we find out that they will say the thing we picked. That's not constitutionally effective.

B. Monahan's Failure to Investigate the Sole Eye-Witness

Even more shocking than hiring his chief expert witness one day before trial was Monahan's complete failure to investigate the one and only eyewitness to the incident, Sarah Robinson. Despite Robinson's critical status as the eyewitness, Monahan never even attempted to interview her because it was his practice never to interview a state's witness. As Monahan testified, "I just felt that [Robinson] wasn't going to give me anything that would help." Monahan hoped that Robinson would hear his opening statement and "if she heard those facts that I was saying, she would help [Koon]."

Monahan's defense rested in part on facts showing that Robinson had informed Koon that his wife was having an affair with LeBlanc. According to Monahan, given the drug withdrawals that Koon was suffering, finding out that his wife was having an affair with LeBlanc was the added push causing him to commit the murders in a heat-of-passion. Thus Robinson's testimony on this issue was critical. However, Robinson testified in complete contrast to that of Koon and Monahan's theory of defense.

At trial, Robinson testified that she was with Koon the night before the murders. She stated that she was not sure whether Koon ingested drugs or alcohol the night before the killings, and denied that he took anything the morning of the incident. Robinson denied telling Koon that his wife was having an affair with LeBlanc. Robinson's testimony as to the actual murders was one that presented Koon as a "cold-blooded" killer, which was drastically different than Monahan's theory of a heat-of-passion type of killings. She has since recanted this testimony.

At the federal hearing, Robinson testified that she would have cooperated with Monahan had he approached her and assured her that the State would not hold her criminally responsible for the killings as a result of her cooperation with the defense. The court viewed Robinson's demeanor carefully. While the State stresses that Robinson has repeatedly lied in regards to the actual facts of the incident, the court finds Robinson's testimony at the federal hearing to be very credible, and accepts it as true. As Robinson

did not testify at the state post-conviction hearing, the court does not find any contradicting evidence on the issue of her willingness to cooperate with Monahan had Monahan attempted to speak with her *ante* trial. Had Monahan attempted to interview Robinson, she would have told him about the drugs Koon was doing in the early morning hours before the killings, which included cocaine, Xanax, Valium and beer. Moreover, Robinson testified that she would have informed Monahan that she told Koon about his wife's affair with LeBlanc on the way to the Guidry house the morning of the killings.

Expert witness Ms. Mann testified that because criminal defense attorneys do not have the subpoena power to get witnesses to talk to them, and since witnesses do not have to talk to criminal defense lawyers and are often reluctant to do so, "[w]e go knock on their door, we sit down and talk with them, we answer their questions." Ms. Mann explained that "Sarah Robinson could have been provided with counsel, independent counsel, to advise her so that she would know precisely what risks were and were not realistic." Ms. Mann testified that the ABA standards then in place required defense attorneys to at least attempt to interview opposing witnesses. As Ms. Mann stated, "if [Robinson] was going to tell ten different stories, [Monahan] would have learned that. If she was going to say something entirely different, he would have learned that. And he would have been prepared with that knowledge."

4. Monahan's Failure to Prepare Koon's Testimony

Monahan also put his client on the witness stand during the guilt phase. Koon testified that he took Xanax and beer at approximately 2:00 a.m. the morning of the killings. Contrary to Robinson's testimony, at trial Koon testified that Robinson told him that his wife was having an affair with LeBlanc. It was at this time that Koon arrived at the Guidry house and felt like he was in a "dream-state." He testified that all his vision went down to nothing, and he did not have any control over his actions and could not hear anything.

Monahan put little effort into preparing Koon for testimony. As Monahan stated, he likes to "have a conversation with a client," and "then put them on the stand and then have that same conversation." Ms. Mann testified, on the other hand, that "[i]f one believes that there is a possibility that the client will testify, one must reach that conclusion long before trial because you cannot prepare during the trial." She stated that preparation with the client includes going over questions and answers, talking about possible cross-examination, and actually having another lawyer question the defendant as the prosecutor. Ultimately, as Ms. Mann testified, the client cannot make an informed decision about whether or not to testify, and whether or not he or she can handle the pressures of testifying, unless he knows what it means to testify.

As a result of the lack of preparation, Koon came across as showing no remorse for his actions and as very unsympathetic. On cross-examination, Koon referred to one of the victims as a bully. Even Monahan admitted that Koon made an awful witness, and in retrospect he would not have put Koon on the witness stand and would have fought with him over not testifying.

B. Conclusions of Law as to Ineffective Assistance-Guilt Phase

The court finds that Koon was denied an effective assistance of counsel, as that term is construed under U.S. Const. Amends. VI, XIV, during the guilt phase of his murder trial. The Supreme Court established the legal principles that govern claims of ineffective assistance of counsel in *Strickland v. Washington,* 466 U.S. 668 (1984). Ineffective assistance of counsel under *Strickland* is deficient performance by counsel resulting in prejudice. 466 U.S. at 687. Trial counsel's performance is to be measured against an "objective standard of reasonableness," under "prevailing professional norms." *Id.* at 688. In determining ineffective assistance, the Supreme Court refers to the ABA Standards of Criminal Justice as "'guides to determining what is reasonable.'" *Rompilla v. Beard,* 545 U.S. 374, 387 (2005); *Wiggins,* 539 U.S. at 524; *Strickland,* 466 U.S. at 688.

The State urges the court to disregard the ABA standards on effective trial representation. The State

asserts, through testimony of its capital defense expert, Hugo Holland, that the ABA criminal defense standards are primarily promulgated by criminal defense attorneys and that prosecutors have very little input. The court disagrees, and in fact finds Holland to not be a credible witness. Instead, the court finds the declaration of one Robert M.A. Johnson to be credible and true. Johnson's declaration explains the long and careful process involved in promulgating the ABA's Criminal Justice Standards. In finding Johnson's affidavit more credible than the State's affidavits and testimony on the subject, the court finds that prosecuting attorneys play an equal and meaningful role in creating the standards. Thus, like the Supreme Court, this court considers the ABA Standards of Criminal Justice to be persuasive guides in determining what is effective assistance of counsel.

1. Constitutionally Deficient Performance

The ABA standards in circulation at the time of Koon's trial in 1995 described defense counsel's general duty to investigate as follows:

> (a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The

> duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

ABA Criminal Justice Standards, 4-4.1. Guided by *Strickland,* the Fifth Circuit has held that counsel's failure to interview eyewitnesses to a charged crime constitutes constitutionally deficient representation. *See Soffar v. Dretke,* 368 F.3d 441 (5th Cir. 2004). In *Soffar,* the court found that "defense counsel . . . offered no acceptable justification for the[ ] failure *to take the most elementary step of attempting to interview the single known eyewitness to the crime* with which their client was charged." *Id.* at 473-74. The court finds the *Soffar* court's analysis persuasive, and binding, and thus quotes the following:

> The scope of a defense counsel's pretrial investigation necessarily follows from the decision as to what the theory of defense will be. At the state habeas proceeding, both Cannon's and Stover's testimony made it clear that their defense theory was that Soffar's self-incriminating statements were false and should not be believed. Nevertheless, in spite of this theory of defense, Soffar's defense counsel never attempted to interview Garner, the only known eyewitness, to (1) obtain his description of the perpetrator[s] and his version of the crime events; to (2) determine whether he could testify at trial, the substance of his potential testimony, and whether it would be consistent with his taped and transcribed statements and any

other information he gave to the police; and (3) whether he could identify the perpetrator[s], had already done so, or attempted to do so. Defense counsel testified that they did not seek to interview Garner because an unspecified person told them Garner was a "vegetable."

"Guided by *Strickland,* we have held that counsel's failure to interview eyewitnesses to a charged crime constitutes 'constitutionally deficient representation.'" *Anderson v. Johnson,* 338 F.3d 382, 391 (5th Cir. 2003) (quoting *Bryant v. Scott,* 28 F.3d 1411, 1418 (5th Cir. 1994)). In *Bryant,* the defense counsel did not interview two eyewitnesses and limited his pretrial investigation to examination of the prosecutor's file, discussions with the accused, and a review of the indictment. 28 F.3d at 1418. We observed that "information relevant to [the] defense might have been obtained through better pretrial investigation of the eyewitnesses, and a reasonable lawyer would have made some effort to investigate the eyewitnesses' testimony." *Id.* (alteration in original) (citation and quotations omitted). In *Anderson,* we held that a trial counsel's failure to interview an eyewitness rose to the level of constitutionally deficient performance, given the gravity of the burglary charge, and the fact that there were only two adult eyewitnesses to the crime; and that counsel relied exclusively on the investigative work of the State, basing his own pretrial "investigation" on "assumptions divined from a review of the State's files." *Id.*

> We conclude that Soffar's defense counsel have offered no acceptable justification for their failure to take the most elementary step of attempting to interview the single known eyewitness to the crime with which their client was charged. We conclude that this failure is sufficiently deficient to satisfy the first prong [deficient performance] of *Strickland*.

Id.

In the case at bar, Monahan failed to investigate the *only known eyewitness* to the crime. His decision to not even attempt to contact Robinson because he rarely found the State's witnesses willing to cooperate cannot be discounted as trial strategy. Indeed, it baffles the court as to how failing to take the most elementary step of interviewing Robinson constituted any sort of trial strategy. It is clear from the state habeas proceeding and the federal evidentiary hearing that Monahan's theory of defense was that Koon was going through a drug withdrawal process and his mental state was altered because of Robinson informing him that his wife was having an affair with LeBlanc. Such a theory necessitated interviewing the only known eyewitness to determine if she would have corroborated Koon's appearance and state of mind at the time of the killings. Indeed, Robinson was the *only* person, except for Koon himself, that had any knowledge as to how Koon was acting in the moments before the killings. It was essential that Monahan find out before trial what Robinson planned

to say on the witness stand. That there existed questions as to Robinson's credibility was not a sufficient reason to refrain from investigating her story. In *Anderson v. Johnson,* 338 F.3d 382, 392 (5th Cir. 2003), the Fifth Circuit stated that while,

> a lack of credibility might support a strategic decision not to call a witness to *testify* at trial, . . . a witness's character flaws cannot support a failure to *investigate.* Without so much as contacting a witness, much less speaking with him, counsel is "ill-equipped to assess his credibility or persuasiveness as a witness," . . . *Strickland* simply does not "require . . . defer[ence] to decisions that are uninformed by an adequate investigation into the controlling facts and law."

"The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense," but is also dictated by the ABA Standards of Criminal Justice. *Rompilla,* 545 U.S. at 387. The court finds that Monahan failed to take even the elementary step of finding out what the State knew about Robinson's involvement with Koon at the time of, and before, the incident. Speaking to Koon alone was insufficient, and failing to *attempt* to contact Robinson was unreasonable. In light of these circumstances, the court holds that Monahan's failure to investigate Robinson *ante* trial was constitutionally deficient performance.

However, the court need not only rely on Monahan's failure to interview Robinson in finding his performance deficient. The court also finds Monahan's conduct even more egregious due to his failure to employ an expert witness on the issue of Koon's mental state at the time of the killings until *one day* before trial. Koon was in effect denied effective representation because Monahan failed to properly present a defense of mental disease or defect. The uncontroverted evidence is that Dr. Zimmerman only had enough time to examine Koon for about an hour. Naturally, his testimony was torn apart by the State's rebuttal expert, Dr. Hoppe. Monahan had secured funds to hire an expert witness nearly one year before trial, yet he failed to do so. The court also finds that Monahan's failure to prepare Dr. Zimmerman for trial, failure to use the services of a second attorney, and failure to adequately prepare Koon's trial testimony as additional evidence showing Monahan's overall lack of preparation and investigation into this case. As to Vinet's last minute withdrawal as co-counsel, the court acknowledges Koon's waiver of her presence during trial. However, there is nothing in the record showing that Koon ever waived his right to have her *work on and investigate* his case. As Ms. Mann explained, the ABA standards then in place required a minimum of two attorneys representing a capital-defendant. *ABA Criminal Justice Standards,* 5-6.1; Louisiana Supreme Court Rule 31. Nonetheless, Monahan refused to allow Vinet to assist on the case.

That the state court did not sustain habeas relief on the basis of Monahan's refusal to be assisted by Vinet does not preclude this court from considering this factor.[4] It cannot be disputed that had Monahan used Vinet, or any other qualified attorney for that matter, as co-counsel, a much more thorough investigation would have taken place. While perhaps Monahan's failure to use co-counsel's services, standing alone, *may* not be sufficient to sustain habeas relief – which was the inquiry that the state court examined, *State v. Koon,* 704 So.2d at 769 – it is appropriate for this court to consider this factor, *along* with his lack of investigation of Robinson's story and preparation of a mental health defense, in determining if Monahan was ineffective. *See Lovett v. Florida,* 627 F.2d 706, 708 (5th Cir. 1980) (holding that ineffective assistance of counsel claims are not to be examined by looking at errors in a piecemeal fashion, but rather totality of circumstances must be analyzed); *Carbo v. United States,* 581 F.2d 91, 92 (5th Cir. 1978). The court finds that Monahan's

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[4] State Record at Appdx. to Vol. 1, §28 at 68-69. Louisiana courts have long adhered to the view that the better practice is to appoint two attorneys to defend a capital case. *See e.g., State v. Williams,* 480 So.2d 721, 728 n.14 (La. 1985). However, the Louisiana Supreme Court has held that Louisiana Supreme Court Rule 31 "does not give rise to an affirmative right to multiple attorneys in capital trials." *State v. Koon,* 704 So.2d at 769. Nonetheless, although an "affirmative right" to two attorneys may not exist in Louisiana, Monahan's refusal to be assisted by competent co-counsel can factor into the ineffective assistance analysis.

refusal to allow Vinet to assist on the case ran counter to the spirit of the ABA standards and the Louisiana Supreme Court rules, and when combined with Monahan's overall lack of investigation and preparation, the result was clear – constitutionally deficient representation.

2. Prejudice

The court must next determine whether Monahan's constitutionally deficient performance was prejudicial to Koon. *Strickland,* 466 U.S. at 687; *Brecht v. Abrahamson,* 507 U.S. 619, 638 (1993) (holding that a habeas petitioner must establish that the trial error resulted in "actual prejudice."). To be prejudicial, the constitutional error must have permeated the entire trial with obvious unfairness. *United States v. Jones,* 287 F.3d 325, 331 (5th Cir. 2002); *Garland v. Maggio,* 717 F.2d 199, 206 (5th Cir. 1983). Under *Brecht,* the constitutional trial error is only harmful if there is "more than a reasonable possibility that it contributed to the verdict." *Mayabb v. Johnson,* 168 F.3d 863, 868 (5th Cir. 1999). The Fifth Circuit has stated that, "[i]f our minds are 'in virtual equipoise as to the harmlessness,' under the *Brecht* standard, of the error, then we must conclude that it was harmful." *Woods v. Johnson,* 75 F.3d 1017, 1026 (5th Cir. 1996) (*quoting O'Neal v. McAninch,* 513 U.S. 432 (1995)). In the Fifth Circuit, the *Brecht* standard has survived the AEDPA and is still applicable for

harmless error analysis. *Robertson v. Cain,* 324 F.3d 297, 306-07 (5th Cir. 2003).[5]

In the case at bar, Monahan's constitutionally deficient performance resulted in actual prejudice to Koon. Had Monahan attempted to interview Robinson before trial, she would have talked to him and told him about the drugs Koon was doing in the early morning hours of the day of the killings. These were the types of drugs that Koon also testified to taking at 2:00 a.m. in the morning of the day of the killings. She would have told Monahan that Koon was in a drunken and drug induced state at the time of the killings. She would have further told Monahan that she had informed Koon of his wife's affair with LeBlanc only moments before Koon shot and killed the Guidry family. Most importantly, she would have cooperated with Monahan had he simply reassured her that the State would not file charges against her if she helped Koon.

Both parties make much over Robinson's previous record of lying, sometimes even under oath. However, Robinson did not testify at the state habeas hearing. Thus, the court has nothing to give deference to on the issue of Robinson's credibility. Accordingly, 28 U.S.C. §2254(e) is not even triggered. This court is

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[5] Because the state court found Monahan's representation adequate, it never reached the issue of prejudice. Accordingly, this court reviews the prejudice prong of the *Strickland* claim *de novo*.

therefore permitted to make a credibility determination as to Robinson's testimony during the federal evidentiary hearing – the only habeas hearing at which she has testified. *See Herrera v. Collins,* 506 U.S. 390, 445 (1993) (Blackmun, J., dissenting). The court finds Robinson was very credible at the federal hearing. Accordingly, had Monahan investigated the case, there would have been more than a reasonable probability that the outcome would have been different. The State's case against Koon was primarily centered on Robinson's testimony. Had she not controverted Koon's theory of defense, it is likely that the jury would have given more consideration to Monahan's "heat-of-passion" defense.

In addition, Koon's failure to provide Dr. Zimmerman with additional time, rather than *one hour, one day before trial,* was prejudicial. Koon's mental disease or defect defense rested on the credibility of Dr. Zimmerman. He was the chief expert on the subject. Dr. Hoppe's rebuttal was of devastating effect because it highlighted the limited time and limited information Dr. Zimmerman used in arriving at his conclusion. The court has reviewed the state record and notes that Dr. Hoppe did not conduct an examination of Koon. His rebuttal was mostly based on the fact that Dr. Zimmerman's examination was poorly conducted. Had Monahan investigated Koon's mental disease defense by hiring Dr. Zimmerman at a much earlier date, there is a strong probability that Dr. Hoppe's rebuttal would have had less of an impact in hurting Koon's defense.

The court is disturbed by Monahan's performance. A review of the record shows that Koon's actions could have been construed as something less than first-degree murder – be it second degree murder under La. Rev. Stat. 14:30.1(A), or manslaughter under La. Rev. Stat. 14:31(A)(1). Had Monahan investigated the case, outside of simply relying on what Koon told him, there is a reasonable probability that Koon would not have been found guilty of first-degree murder. Thus it follows that confidence in the outcome of the trial has been undermined.

3. State Habeas Court's Unreasonable Application of Law

Before Koon is entitled to a new trial as a result of Monahan's constitutionally deficient performance, the court must determine whether the state court's resolution of Koon's claim of ineffective assistance of counsel "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Rompilla,* 545 U.S. at 380 (*quoting* 18 U.S.C. §2254(d)(1)). An "unreasonable application" occurs when a state court identifies the correct governing legal principle from the Supreme Court's decisions, but unreasonably applies that principle to the facts of the petitioner's case. *Wiggins,* 539 U.S. at 520; *Williams,* 529 U.S. at 413. That is, the state court's decision must have been not only incorrect, but it must have also been unreasonable. *Wiggins,* 539 U.S. at 520-21.

Koon concedes that the state court correctly identified the governing legal rule to be applied. His argument, however, is that the state court was unreasonable in applying the rule to the particular facts of his case. The state court addressed Koon's contention that Monahan was not prepared to try the guilt phase of the trial. The state court found that Monahan was prepared in that he "did a good job with what he had to work with." The court finds such an application of federal law to be unreasonable. The state court's reasoning fails to acknowledge that Monahan's performance was to be measured by an objective standard of reasonableness under prevailing professional norms, not by his own limited investigation. The ABA guidelines and Supreme Court and Fifth Circuit precedent, as discussed above, required Monahan to promptly investigate the case and to at least interview the lone eyewitness. This Monahan failed to do. Thus what Monahan "had to work with" was limited by his own constitutionally deficient performance. Moreover, the state court denied Koon's claim for relief on the basis of Monahan's failure to employ the assistance of a second attorney by noting that Koon failed to object when Vinet filed her motion to withdraw. Once again, the state court unreasonably applied federal law. First, Vinet withdrew from the case on the second day of voir dire. Secondly, Koon only waived any objection to Vinet's representation during trial, not to her assistance during the pretrial investigation.

The Supreme Court has stressed that the ABA standards are to be applied in determining whether trial counsel's performance was deficient. *Rompilla,* 545 U.S. at 387. It is undisputed that the criminal justice standards then in place at the time of Koon's trial required a minimum of two qualified attorneys *working* on a capital case. *ABA Criminal Justice Standards,* 5-6.1; Louisiana Supreme Court Rule 31. The court notes that the record only shows that Koon waived his right to have Vinet represent him at trial. Nowhere does the record indicate that he waived his right to have Vinet, being his court-appointed co-counsel, assist Monahan during the *preparation* of his defense. However, by his own admission, Monahan did not rely upon Vinet or the services of an investigator to assist him in preparing Koon's defense. Monahan stated that he "had really not delegated anything to Ms. Vinet, so it wasn't like her withdrawing had yanked the rug out from under me." Thus to hold Koon responsible for his counsel's refusal to be assisted in the preparation of the case is unfair. The court finds there is a reasonable probability that had Monahan fulfilled his professional duty and used the assistance of co-counsel, the outcome of the trial would have been different. If Monahan was unwilling to investigate the sole eyewitness, Robinson, perhaps Vinet would have. She was, however, never given the opportunity to do so. Accordingly, the trial court's denial of relief on this basis was unreasonable.

II. Ineffective Assistance During the Penalty Phase

Although the court finds Koon's claim of ineffective assistance of counsel during the guilt phase of his trial to have merit, it will nonetheless also address his claim of ineffective assistance during the penalty phase.

A. Findings of Facts as to Ineffective Assistance – Penalty Phase

Monahan's entire penalty phase case rested on the testimony of Koon's mother; such testimony taking up only two pages in the transcript. In preparing for Koon's defense during the penalty phase, Monahan, by his own admission (1) did not secure a mitigation expert to help prepare a social history; (2) did not himself prepare a social history of Koon; (3) did not gather basic documents regarding Koon's life history; (4) did not interview anyone, concerning Koon's background, other than Koon, Koon's two brothers, uncle and mother; and (5) despite presenting a mental health defense that he hoped would spill over into the penalty phase, did not even attempt to hire any sort of mental health expert until one day before the trial. The state post-conviction court found that Monahan's strategy was to put most of his mitigation evidence on during the guilt phase because that strategy had worked for him in previous cases.

Although there was significant evidence that Koon's mental state was "impaired" at the time of the

killings, Monahan failed to introduce any such evidence in mitigation of a death sentence. *See Lockett v. Anderson,* 230 F.3d 695 (5th Cir. 2000) (holding that trial counsel's failure to conduct adequate investigation into mental health relevant to mitigation constituted ineffective assistance). Dr. George Seiden examined Koon in prison for in excess of three hours in 2003. The purpose of his examination was to prepare an accurate diagnosis of Koon's mental state at the time Koon committed the killings. Dr. Seiden diagnosed Koon as suffering from alcohol dependence, continuous in full, sustained remission in a controlled environment. He also diagnosed Koon as suffering from cocaine dependance, continuous in full, sustained remission in a controlled environment. The third diagnosis was that Koon was suffering from dependence on anti-anxiety drugs like Valium and Xanax. Fourth, Dr. Seiden testified at the federal hearing that Koon was suffering from substance-induced mood disorder. The final diagnosis was that Koon was suffering from adjustment disorder with a depressed mood.

Although Dr. Seiden did not testify at the penalty phase of Koon's trial, he testified at the federal hearing that Koon's mental status at the time of the killings was "clearly impaired," – a result caused by substance abuse. Dr. Seiden testified that in the week preceding the killings, Koon was dealing with a divorce, he found out that he owed money to the IRS, he became physically ill, he was sleep-deprived, and he was abusing large amounts of a variety of substances, including

cocaine, alcohol, Xanax and Valium. This was all in addition to the fact that Robinson had told him, immediately prior to the killings, that his wife was having an affair with LeBlanc.

Dr. Seiden further testified to the literature supporting a finding that drugs such as Valium and Xanax increase incidents of impulsive and aggressive behavior. Dr. Seiden addressed the fact that cocaine is widely known to increase irritability, paranoid thinking and violent behavior. Alcohol significantly raises cocaine blood levels, which in turn increases irritability and has potential behavioral effects. According to Dr. Seiden, the drugs and alcohol that Koon was taking the weeks leading up to the killings resulted in a "soup of substances that increase[d] the likelihood of impulsive aggression and decrease[d] [Koon's] mental sharpness." This "soup of substances," in Dr. Seiden's opinion, impaired Koon's ability to conform his behavior to the requirements of the law. It disinhibited Koon and made him less likely to make good judgments. Dr. Seiden, if called to testify at the penalty phase, would have opined that at the time of the killings, Koon was under the influence of extreme mental and emotional disturbance. The State argues that Dr. Seiden's testimony on Koon's intoxication is irrelevant because by Koon's own admission, he did not take any drugs the day of the killings. However, the evidence is that Koon did take some Xanax around 2:00 a.m. on the morning of the killings. Moreover, Dr. Seiden's testimony is relevant because it addresses Koon's dependence on alcohol and drugs,

and his emotional disturbance, all matters relevant in presenting a mitigation defense.

Ms. Mann testified on the issue of whether Monahan should have put on evidence of Koon's mental health in the penalty phase. Ms. Mann explained that presenting expert testimony in the guilt phase in hopes that it would carry over into the penalty phase did not excuse Monahan from presenting a penalty phase. Not only did Monahan fail to put on any evidence of Koon's mental state, coupled with drug and alcohol addiction, during the penalty phase, he conducted very little investigation into Koon's background. Monahan admitted that he did nothing to investigate for mitigating evidence other than to interview his client and speak briefly on one or two occasions with Koon's mother and two brothers. The family members Monahan intended to call were Koon's mother and two brothers and an uncle who was a preacher. Monahan claimed to have met with each of these potential witnesses and discussed Koon and his background. From these interviews, Monahan concluded that "there was nothing significant about [Koon's] childhood except that he left [home] when he was 16." Consequently, Monahan's plan was that he would put on a penalty phase in the guilt phase and attempt to "create[ ] at least some sort of whimsical residual doubt." For the penalty phase, Monahan described his strategy as having "the family get up in the penalty phase" and try "to convince the jury that they wanted him to live."

Monahan, however, only called Koon's mother during the penalty phase. He claimed that the reason he did not call any other family members was because after Koon testified, both of Koon's brothers told him that they could not say anything good about Koon. Also, according to Monahan, Reverend Bernard, Koon's uncle and a preacher, told him that he could not get up there "right now."

Reverend Bernard and Koon's brothers, Charles and Lee, testified at the federal hearing. Directly contrary to Monahan's testimony, the three all testified that they were willing to testify at the penalty phase of Koon's trial. All three stated that they were willing to say positive things about Koon in mitigation of the death penalty, but they were all unsure what they could say because Monahan had spent little time with them discussing their potential roles in attempting to save Koon's life. This court was able to view these witnesses as they testified, and the court found all three of Koon's family members to be very sincere and credible in this regard.

As previously mentioned, the only family member to testify on behalf of Koon in mitigation of death was Koon's mother. Her testimony takes up a lonely two pages in the record. Koon's mother testified that Monahan never discussed with her the extent or purpose of her testimony. She stated that she had no idea what Monahan was going to ask when she took the stand. A review of the penalty phase transcript shows that only about half of her testimony – consisting of one page in the transcript – was directed

toward Koon. After the sparse questioning that took place, Monahan rested his penalty phase case.

Moreover, Monahan never employed the services of an investigator or mitigation specialist to prepare any sort of social history of Koon. The court finds Ms. Mann's testimony on this issue credible. Ms. Mann explained that the ABA standards for the performance of counsel in the defense of capital cases at the time of Koon's trial recommended the creation of a social history. *ABA Criminal Justice Standards,* 11-4.1. She testified that creating a social history involves obtaining nearly every relevant document relating to the client's life, interviewing *every* living family member that can be found, interviewing doctors, teachers, pastors, next-door neighbors, friends, and generally everyone that has relevant information in support of mitigation of death. Once having reviewed the documents and listened to the words of all those people, then, according to Ms. Mann, "you do anything else that is indicated from that."

Ms. Mann explained that the preparation by a mitigation specialist of social history reports is standard practice in the defense of capital cases. A mitigation expert is usually required to create a social history because such experts are trained to ask questions in a way that will allow people to tell them unpleasant, uncomfortable things in difficult situations. Ms. Mann stated that this is crucial in capital cases because "[f]amilies are protective of themselves, keep their secrets, and it is not – it is unnatural, it is

sort of anti our culture, to air your dirty laundry; and people don't do that naturally." Accordingly, the ABA standards require that an attorney investigate for mitigation regardless of what the client tells him. *ABA Criminal Justice Standards,* 11-4.1. Thus Monahan's limited investigation, which constituted very brief interviews with a few family members, should not have ended his inquiry into Koon's life history.

The court finds that beyond the few family members Monahan very briefly spoke to, he did not investigate, prepare, or in essence even present a case in mitigation of death. The federal hearing displayed the great deal of mitigation evidence available to present to the jury. Monahan, by his own admission, testified that he was "not a big fan" of mitigation evidence, which he considered to be limited to evidence of childhood abuse. He testified that he did not plan to "go in there with the abuse excuse." As a result of Monahan's failure to put on an effective mitigation defense, the jury never heard Dr. Seiden's testimony that Koon was suffering from dependence on alcohol, cocaine, Xanax, and Valium. The jury never heard of the medical evidence that Koon was then suffering from substance-induced mood disorder and adjustment disorder with a depressed mood. The jury never heard family members speak of Koon's work ethic, family loyalties, and their continued love for him despite what transpired at the Guidry house.

The jury also never heard, during the penalty phase, that Koon had no significant prior history of

criminal conduct. Ms. Mann testified this circumstance was significant because to many lay jurors, it meant that for the most part, Koon was like them. Koon's whole life was rather uneventful as far as crime was concerned. Ms. Mann stressed,

> it has been my experience – if a person was abused, of course, you should tell the jury about that; if they're mentally ill, of course you should tell the jury about that, because that is something that makes up the whole human being. But if they are not abused and they are not mentally ill, you still tell the jury what makes up this whole human being. And those cases are successful.

The court finds that Monahan failed to tell Koon's story to the jury, and thus the jury failed to hear who Koon, the whole human being, truly was.

B. Conclusions of Law as to Ineffective Assistance – Penalty Phase

A petitioner claiming ineffective assistance of counsel during the penalty phase must show both counsel's performance was deficient and that the deficient performance prejudiced the petitioner's defense. *Williams v. Cain,* 125 F.3d 269, 276 (5th Cir. 1997).

1. Constitutionally Deficient Performance

Koon was denied the effective assistance of counsel during the penalty phase of his murder trial. Monahan's failure to investigate and put on an adequate penalty phase was constitutionally deficient when tested against the "objective standard of reasonableness" under what was then the "prevailing professional norms." *Strickland,* 466 U.S. at 687-88; *Wiggins,* 539 U.S. at 521. Monahan was certainly deficient by his failure to comply with the "norms of adequate investigation in preparing for the sentencing phase of a capital trial, when defense counsel's job is to counter the State's evidence of aggravated culpability with evidence of mitigation." *Rompilla,* 545 U.S. at 380-81.

The ABA Criminal Justice Standards state,

> The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions.

ABA Criminal Justice Standards, 4-4.1, Commentary (3d ed. 1993). Monahan failed to meet the ABA standards through his lack of investigation and presentation of relevant mitigation evidence.

The duty to investigate is critically important in capital penalty phase proceedings. In a capital case, a criminal defendant has a constitutionally protected right to provide the jury with mitigating evidence. *Williams,* 529 U.S. at 393. "To perform effectively in the penalty phase of a capital case, counsel must conduct sufficient investigation and engage in sufficient preparation to be able to 'present[ ] and explain[ ] the significance of all the available [mitigating] evidence.'" *Mayfield v. Woodford,* 270 F.3d 915, 927 (9th Cir. 2001) (*quoting Williams,* 529 U.S. at 399).

Although the court agrees with the State that it must usually defer to a lawyer's strategic trial choices, *Guy v. Cockrell,* 343 F.3d 348, 352 (5th Cir. 2003); *Knox v. Johnson,* 224 F.3d 470, 479 (5th Cir. 2000), those choices must have been made after counsel conducted "reasonable investigations or [made] a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691. During penalty phase proceedings, counsel has a duty to make a "diligent investigation into his client's troubling background and unique personal circumstances." *Williams,* 529 U.S. 415. As the Supreme Court has stated, there is a "belief, long held by society, that defendants who commit criminal acts that are attributable to a disadvantaged background

or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Boyde v. California,* 494 U.S. 370, 382 (1990) (quotation and emphasis omitted). To that end, investigations into mitigating evidence should unearth all relevant information for consideration at the capital sentencing phase.

Although the Fifth Circuit abides by the rule that "[t]he failure to present a case in mitigation during the sentencing phase of a capital trial is not, *per se,* ineffective assistance of counsel," *Stringer v. Jackson,* 862 F.2d 1108, 1116 (5th Cir. 1988), *vacated and remanded on other grounds,* 503 U.S. 222; *West v. Johnson,* 92 F.3d 1385, 1408 (5th Cir. 1996); *Cain,* 125 F.3d at 277, trial counsel does at least have to make "reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691.[6]

Monahan failed to make a *reasonable* investigation into Koon's background. By his own admission, he is "not a big fan" of mitigating evidence. Although Monahan's plan was to put on his mitigation case

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[6] The Ninth Circuit, on the other hand, takes a markedly different approach. That circuit has held that the "[f]ailure to present mitigating evidence at the *penalty phase* of a capital case constitutes ineffective assistance of counsel." *Bean v. Calderon,* 163 F.3d 1073, 1079 (9th Cir. 1998) (emphasis added).; *Smith v. Stewart,* 140 F.3d 1263, 1268 (9th Cir. 1998); *Correll v. Stewart,* 137 F.3d 1404, 1412 (9th Cir. 1998); *Clabourne v. Lewis,* 64 F.3d 1373, 1384 (9th Cir. 1995).

during the guilt phase, the court refuses to discount what he did as trial strategy because doing so ignores the true problem. It was Monahan's lack of investigation into mitigating evidence that is at the heart of the issue. Monahan's presentation of mitigating evidence, during the guilt phase, was limited by his lack of investigation. He cannot be said to have used trial strategy when that strategy was premised on a lack of investigation, preparation, or consideration of mitigating evidence.

It is undisputed that Monahan failed to hire an investigator or a mitigation specialist. Moreover, the state habeas court never had the opportunity to listen to Koon's family's testimony because the state court did not allow them to testify. Thus this court need not show any deference on this issue because the state court never made any relevant factual findings. *Cf.* 28 U.S.C. 2254(e)(1). This court, however, did hear the evidence, and found Koon's two brothers and uncle to be very credible. They testified, contrary to Monahan's assertions, that they were ready, willing, and able to testify on behalf of Koon – they just did not know what to say. This is because Monahan failed to prepare any witnesses properly. Even Koon's mother, the only witness Monahan presented, did not know what she was to do when she got up on the stand. She testified that Monahan never discussed with her the purpose of her testimony. After considering the severity of the punishment that hung in the balance, and the amount of mitigating evidence available for use during the penalty phase, the court

holds that Monahan's performance with respect to the penalty phase of Koon's trial was constitutionally deficient.

2. Prejudice

To establish prejudice, Koon must show that it was reasonably likely that one juror would have voted against death absent Monahan's unprofessional errors. *Cain,* 125 F.3d at 279; *Faulder v. Johnson,* 81 F.3d 515, 519 (5th Cir. 1996). A "reasonable probability" need not be proof by a preponderance that the result would have been different, but it must be "sufficient to undermine confidence in the outcome" of the verdict. *Strickland,* 466 U.S. at 694. Because the state court never reached the issue of prejudice, this court reviews the evidence *de novo.* 545 U.S. at 388.

The State's assertion that "there is no significant difference in the testimony presented at the federal evidentiary hearing and the state court trial" is wrong. Dr. Seiden testified extensively, at the federal hearing, as to Koon's history of drug addiction and mental disorders. Dr. Seiden, unlike the doctors that testified at trial, examined Koon for a number of hours. Moreover, none of Koon's family, except for his mother, testified at trial because Monahan refused to put any of them on the stand. Ms. Mann provided expert opinion on the subject of preparing witnesses for a penalty phase. She testified,

> I would rather have too many witnesses waiting in the hall than too few. You just

> prepare. . . . [i]t's not as if you're trying to say please don't look behind the curtain and don't see the real human being there; you're doing just the opposite. That is what [you want] the jury to see, is a real, live, flesh-and-blood human being. There are almost no dangerous witnesses in a mitigation case.

According to Ms. Mann, "there were many, many people who were available, who have been identified readily by people who've just gone out and done a social history," and, importantly, could have corroborated much of what Koon testified to about himself. Due to Monahan's lack of investigation, none of these potential witnesses were interviewed and none were presented to the jury. Ms. Mann's expert opinion was that there was a reasonable probability that, but for Monahan's constitutionally deficient performance in putting together a case in mitigation of death, the result of the proceeding would have been different.

Even the State's capital attorney expert stated that telling a positive life story about a person "might be one of the more effective things" he has heard about in the defense of a capital case. All that was required was one juror to vote against the death penalty and Koon's life would have been spared. After considering the totality of the evidence available for mitigation that Monahan did not use or look into, the court concludes that there was a reasonable probability that the outcome would have been different had Monahan's performance not been constitutionally

deficient. Accordingly, confidence in the fairness of Koon's death penalty has been undermined.

3. State Habeas Court's Unreasonable Application of Law

As noted *supra*, the state court refused to allow Koon the opportunity to call any witnesses except for Monahan and Vinet, thereby prohibiting him from fully developing the facts in support of his claims for habeas relief. On the issue of whether Monahan failed to investigate and present mitigating evidence at the penalty phase, the state court ruled,

> that is probably the biggest question that I have in this. And, maybe, had there been another lawyer more testimony might have been presented, maybe, not. Maybe the witnesses still would have had the same reaction – I don't want to testify. I don't know anything good I can say about Joey Koon – the ones that Mr. Monahan had lined up. I don't know who else you can call other than your brothers and your mother – your brothers and your preacher refuse to testify because they don't have anything good to say about you. I don't know that, even though now there are people out there who are saying, according to your affidavits, they weren't contacted and were willing to come in and testify, I don't know at the trial if they would have and I don't know if they would have. If your own brothers don't have anything good to say about you, what these other people

> could have said that would change the jury's mind, which is one of the factors, whether or not he got a fair trial because Mr. Monahan didn't call everybody and his brother, so to speak, to testify about Mr. Koon. . . . But the issue is whether or not he got a fair trial because of that and whether or not Mr. Monahan was ineffective in his representation in the defense of Mr. Koon, and I don't think that he was. . . .

In so reasoning, this court holds that the state court failed to evaluate the totality of the available mitigating evidence in determining whether that potential evidence might have influenced the jury's appraisal of Koon's moral culpability. The trial court applied the wrong legal standard in this case. It determined whether the potential mitigating evidence not presented by Monahan would have changed the jury's mind. The standard to be applied, however, is whether there is a reasonable probability that one juror would have voted against the death penalty, thus undermining confidence in the outcome of the death sentence. *See Nix v. Whiteside*, 475 U.S. 157, 176 (1986). The state court considered whether Monahan's performance more likely than not altered the outcome of the penalty phase. This is too high of a burden. *See id.* ("Although a defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*, a defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding would have been different.'"). Given the amount of mitigating evidence that Monahan could have used during the penalty phase, this court finds that but for Monahan's unprofessional errors, there was a reasonable probability that one juror would have voted against the death penalty. Thus confidence in the outcome of the penalty phase has been undermined.

The state court unreasonably applied federal law to the issue of ineffective assistance of counsel during the penalty phase of Koon's trial. Accordingly, Koon's sentence of death must be vacated.

III. Erroneous Admission of Koon's Confession

In his third, and final, claim for relief, Koon challenges the Louisiana Supreme Court's opinion holding that although his confession was erroneously admitted into evidence, it was harmless error. The confession at issue stems from a police interrogation conducted on Koon following the killings. Koon clearly expressed his desire to refrain from talking with the police. *State v. Koon,* 704 So. 2d 756, 761-62 (La. 1997). However, the Baton Rouge detective continued his interrogation of Koon. *Id.* at 763. As a result, Koon confessed that "he killed his wife because she wanted – uh – his business – part of the divorce settlement and that was unacceptable[,]" and that "he killed Mrs. Guidry because she was putting Michele [sic] up to trying to take his business away

from him[,]" and that he killed Mr. Guidry "because he knew he was going for a weapon." *Id.* at 762.

The Louisiana Supreme Court concluded that under *Miranda v. Arizona,* 384 U.S. 436 (1966) and its progeny, the confession was obtained illegally, in violation of Koon's Fifth Amendment right to refrain from self-incrimination, and should have been suppressed. *Koon,* 704 So. 2d at 763. Nevertheless, the court held the error harmless under the analysis of *Arizona v. Fulminante,* 499 U.S. 279, 311 (1991) (holding that when reviewing the erroneous admission of an involuntary confession, the appellate court reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt.). *Koon,* 704 So. 2d at 763, 765-66.

Because disposition of Koon's claims of ineffective assistance of counsel warrant a new trial, his third claim is rendered moot. At the new trial, the state trial court shall deny admission of the challenged confession, as the Louisiana Supreme Court has already ruled it inadmissible. *Id.* at 763.[7]

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[7] Koon has raised a number of other grounds for relief in his petition for habeas corpus. He claims that habeas relief is also warranted because (1) he was forced to file his habeas petition in state court in an unreasonably short period of time; (2) he was denied the right to a fair and impartial trial; (3) he was convicted and sentenced to death on the basis of inadmissible testimony by Dr. Donald Hoppe; (4) the jury was incorrectly instructed by the trial court; (5) the state failed to reveal to him

(Continued on following page)

Conclusion

Koon was deprived of his constitutional right to effective assistance of counsel during both the guilt phase and the penalty phase of his first-degree murder trial. U.S. Const. Amends. VI, XIV. Accordingly, it is ordered that Koon's three convictions of first-degree

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that Robinson never fulfilled the conditions of her probation; (6) his death sentence was in violation of the federal and Louisiana constitutions; and (7) the cumulation of errors infecting his conviction and death sentence violated the federal and Louisiana constitutions.

As to Koon's claim that he was forced to file his habeas petition in state court in an unreasonably short period of time, he requests that the court grant him an evidentiary hearing to more fully develop his case. The court did so on February 14-16 and March 6, 2006, and therefore this claim is now moot. As to his six remaining claims for relief, he presents no argument in support of them, except to say that he incorporates his arguments made to the state post-conviction court. Before granting relief on these claims, Koon must prove that either the state court's ruling resulted in (1) a decision contrary to, or an unreasonable application of, clearly established federal law; or (2) a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. §2254(d). He has failed to do so as to these additional claims. Koon's briefs only address his claims of ineffective assistance of counsel during the guilt and penalty phases of his trial, and the erroneously admitted confession. It has been nearly six years since Koon filed his petition for habeas relief (doc. 1). Accordingly, the court finds that all other grounds for relief, not addressed in the body of this ruling's text, are waived. *Lockett v. Anderson*, 230 F.3d 695, 711 n.27 (5th Cir. 2000). In any case, disposition of Koon's claims of ineffective assistance of counsel moots all other claims for relief.

murder and the sentences of death are hereby REVERSED AND VACATED. The case is remanded to the 19th Judicial District Court for the Parish of East Baton Rouge for a new trial, not inconsistent with this ruling.

Baton Rouge, Louisiana, February 1st, 2007.

/s/ James J. Brady
JAMES J. BRADY,
DISTRICT JUDGE
MIDDLE DISTRICT
OF LOUISIANA

NINETEENTH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

CRIMINAL SECTION III

. . . . . .

STATE OF LOUISIANA :

VERSUS : **NUMBER: 3-93-1268**

WALTER JOSEPH KOON :

. . . . . .

HEARING ON MOTION FOR POST-CONVICTION RELIEF

TUESDAY, MARCH 21, 2000

THE HONORABLE MICHAEL R. ERWIN, JUDGE PRESIDING

APPEARANCES:

CHRISTOPHER NEVELS, ESQ.: FOR THE STATE
ASSISTANT DISTRICT ATTORNEY : OF LOUISIANA

SAMUEL DALTON, ESQ. : FOR THE ACCUSED

TRANSCRIBED BY:
HELEN F. HAMLETT, C.C.R.
NUMBER: 87136
OFFICIAL COURT REPORTER

FILED: APRIL 5, 2000

/s/ Helen F. Hamlett
DEPUTY CLERK
OF COURT

(SEAL) OFFICIAL SEAL
HELEN F HAMLETT
Certified Court Reporter
in and for the State
of Louisiana
Certificate Number 87136
Certificate expires 12-31-00

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[3] **TUESDAY, MARCH 21, 2000:**

REPORTER: DR. DALTON, PERHAPS YOU DIDN'T UNDERSTAND WHAT I SAID EARLIER. THE MIKES ARE DIRECTIONAL MIKES. YOU HAVE TO THE SPEAK DIRECTLY INTO THEM FOR THE SYSTEM TO PICK UP YOUR VOICE. IF YOU'RE NOT ON THE RECORDED RECORD, THEN YOU'LL BE SOLELY ON THE RECORD OF THE COURT REPORTER.

MR. DALTON: THIS IS THE DIRECTIONAL MIKE AND I NEED TO SPEAK RIGHT INTO IT.

REPORTER: YES, SIR.

MR. DALTON: THANK YOU.

THE COURT: ALL RIGHT, LET ME SEE THE REST OF THE MOTIONS.

MR. NEVELS: DON'T WE HAVE PORTABLE MIKES?

REPORTER: WE DO, HOWEVER, THEY DO NOT WORK SO WELL WITH THE VARIOUS RADIO SIGNALS.

THE COURT: THEY'VE GONE DOWN TO GET KOON FROM THE HOLDING CELL DOWNSTAIRS AND HE'LL BE UP HERE IN JUST A MINUTE AND THEN WE'LL GET STARTED.

MR. DALTON: YES, SIR.

MR. NEVELS: JUDGE, AS A PRELIMINARY MATTER, I UNDERSTAND THAT THE SUPREME COURT – THE LOUISIANA SUPREME COURT HAS DENIED MR. KOON'S REQUEST FOR WRITS AND FOR STAY OF THIS HEARING, WE'RE PROCEEDING THIS MORNING ON THE HEARING WITH MRS. VINET AND MR. MONAHAN AS WITNESSES?

THE COURT: THAT'S WHAT WAS ON MY PHONE WHEN I GOT HOME YESTERDAY. DID YOU ALL GET THAT?

MR. DALTON: YES, SIR, WE GOT NOTICE.

MR. NEVELS: JUDGE, THIS IS WHAT I WAS GOING TO SUGGEST OF ASK THE COURT – UH – THERE ARE OTHER [4] POTENTIAL WITNESSES THAT MAY BE CALLED IN THE FUTURE IN THIS CASE AND I THINK THERE MAY BE A NUMBER OF THEM HERE IN THE COURTROOM TODAY, AND I WOULD ASK THAT ANYBODY WHO IS GOING TO BE A POTENTIAL WITNESS

IN THE POST-CONVICTION HEARING, AND I CAN PROVIDE THE LIST OF POTENTIAL WITNESSES AS SUBMITTED BY MR. DALTON, THEY BE SEQUESTERED?

THE COURT: ALL RIGHT, ANY WITNESS TODAY OR WHO HAVE BEEN PUT ON A WITNESS LIST BY MR. DALTON, THAT HE CLAIMS I WON'T ISSUE, BUT I MAY IN THE FUTURE, I DON'T KNOW. I HAVEN'T YET, BUT IF YOU'RE ON THAT LIST, YOU NEED TO BE EXCUSED FROM THIS HEARING. REMAIN IN THE HALLWAY. DON'T DISCUSS THIS CASE NOR YOUR TESTIMONY OR POTENTIAL TESTIMONY WITH ANYONE. MR. ROCKS, DO YOU KNOW WHO THEY ARE THEY ARE?

MR. ROCKS: EVERYONE THAT'S SEATED RIGHT HERE, YOUR HONOR.

THE COURT: ALL RIGHT.

(REPORTER'S NOTE: THERE WAS A PAUSE IN THE PROCEEDINGS WHILE THE COURT SPOKE WITH HIS LAW CLERK OFF-RECORD AT THE BENCH AND WHILE THE COURT AND COUNSEL AWAITED THE ARRIVAL OF THE DEFENDANT, MR. WALTER JOSEPH KOON.)

MR. NEVELS: JUDGE, MAY I TAKE CARE OF ONE MORE PRELIMINARY MATTER?

THE COURT: YES, SIR.

MR. NEVELS: THE COMMISSIONER ISSUED THE COMMISSIONER'S PRELIMINARY REPORT BACK IN APRIL OF LAST YEAR. IN THAT REPORT, THERE WERE RECOMMENDATIONS MADE THAT CERTAIN MATTERS BE THE SUBJECT OF AN EVIDENTIARY HEARING AND OTHER MATTERS NOT A SUBJECT OF EVIDENTIARY HEARING. SPECIFICALLY, WITHIN THAT [5] RECOMMENDATION THERE WERE FIVE SPECIFIC ISSUES THAT THE COMMISSIONER RECOMMENDED THAT THE HEARING BE LIMITED TO. THE COURT HAS NOT MADE A FORMAL ORDER – THERE WERE OBJECTIONS FILED BY THIS COMMISSIONER'S REPORT, BUT NO FORMAL ORDER HAS BEEN SIGNED, ALTHOUGH WE ARE HERE PRESENT FOR AN EVIDENTIARY HEARING. JUST FOR PURPOSES OF CLARIFICATION I JUST WANT TO MAKE SURE THE COURT WAS GOING TO ACCEPT THAT RECOMMENDATION AND LIMIT THE HEARING TO THOSE ISSUES AS OPPOSED TO THE OTHER ISSUES THAT ARE CONTAINED WITHIN THIS HUNDRED-PLUS PAGE POST-CONVICTION APPLICATION?

THE COURT: WELL, MY THOUGHT PROCESS WAS THAT, BASICALLY, TODAY WE WOULD LIMIT IT TO THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM AND HAVE MR. MONAHAN AND MRS – UH – VINET. IF AT SOME POINT, I, AFTER HEARING THAT EVIDENCE, DECIDE THAT PERHAPS THERE WAS

INEFFECTIVE ASSISTANCE OF COUNSEL OR NOT, THEN I'M GOING TO DETERMINE WHETHER OR NOT WE'RE GOING TO PROCEED TO THE NEXT STEP, WHICH WOULD BE CALLING ALL OF THOSE WITNESSES THAT THEY'VE TALKED ABOUT. I DON'T WANT TO HAVE TO DO ALL OF THAT YET. LET'S SEE WHERE WE STAND AFTER TODAY'S HEARING.

MR. DALTON: THAT'S FAIR ENOUGH, YOUR HONOR.

THE COURT: ALL RIGHT, MR. KOON.

(REPORTER'S NOTE: MR. KOON WAS BROUGHT INTO THE COURTROOM AND SEATED AT COUNSEL TABLE WITH HIS ATTORNEYS.)

THE COURT: ALL RIGHT, THIS IS ***STATE OF LOUISIANA VERSUS WALTER KOON***. MR. KOON IS HERE ON POST-CONVICTION RELIEF APPLICATION IN WHICH THERE WAS A RECOMMENDATION BY THE MAGISTRATE – UH – WHAT DO WE CALL THEM?

[6] MR. NEVELS: COMMISSIONER.

THE COURT: COMMISSIONER THAT THE COURT HOLD A HEARING ON INEFFECTIVE ASSISTANCE OF COUNSEL – ON THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM MADE BY MR. KOON AND HIS LAWYERS. SHE RECOMMENDED THAT THE FIRST – OR THAT THE ISSUE BE LIMITED TO FIVE QUESTIONS, WHICH SHE OUTLINED IN HER REPORT. I AM

NOT GOING TO SAY – YEAH I'M GOING TO SAY THAT WE ARE LIMITED TO THAT AND THEN I'LL SET BOUNDARIES. WE MAY, WE MAY GO A LITTLE BIT BEYOND SOME OF THAT, BUT THAT'S WHERE WE'RE GOING TO TRY TO STAY. EVERYBODY UNDERSTAND?

MR. NEVELS: YES, YOUR HONOR.

THE COURT: MR. DALTON, I GUESS IT'S YOUR MOTION, YOUR BURDEN OF PROOF.

MR. DALTON: YES, SIR, I CALL – UH – MS. DENISE VINET.

THE COURT: ALL RIGHT. WAIT A MINUTE, IS MR. MONAHAN UNDER THE RULE OF SEQUESTRATION?

MR. NEVELS: YES, YOUR HONOR, I MOVED TO SEQUESTER ALL OF THE WITNESSES.

[7] DENISE VINET, CALLED AS A WITNESS ON BEHALF OF THE DEFENSE, HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. DALTON:

Q. MRS. VINET, MY NAME IS SAM DALTON. I'M THE APPOINTED ATTORNEY TO REPRESENT MR. WALTER KOON IN POST-CONVICTION PROCEEDINGS.

A. OKAY.

Q. AND – UH – SO I HAVE A FEW QUESTIONS FOR YOU, DUE TO THE FACT THAT YOU WERE ONCE – UH – APPOINTED –

A. YES, SIR.

Q. – BY THIS COURT TO REPRESENT WALTER KOON, PRIOR TO HIS CAPITAL TRIAL. IS THAT CORRECT?

A. THAT'S TRUE.

Q. AND DO YOU REMEMBER HOW LONG YOU ACTED IN THAT CAPACITY?

A. I GUESS, MAYBE, ABOUT SIX MONTHS – THREE TO SIX MONTHS.

Q. DO YOU KNOW – UH – THE REASON FOR YOUR APPOINTMENT?

A. MR. MONAHAN WANTED ME ASSIST HIM WITH THE TRIAL.

A. ALL RIGHT. NOW – UH – FROM THE TIME THAT YOU WERE APPOINTED, DID MR. MONAHAN ASK YOU TO DO ANYTHING?

A. NO.

Q. NOT AT ALL?

A. NO, I WAS GOING TO HELP HIM DURING THE TRIAL. THAT WAS IT.

Q. OKAY. DID YOU ALL, AT ANY TIME, DISCUSS THE PENALTY PHASE OF THE TRIAL?

A. NO.

Q. NO DISCUSSION WITH THAT AT ALL?

A. NO, SIR.

Q. SO, OBVIOUSLY, YOU MADE NO SUGGESTIONS CONCERNING THE PENALTY PHASE?

A. NO, SIR.

[8] Q. ALL RIGHT. NOW, I ALSO UNDERSTAND THE DAY OF TRIAL OR THE DAY BEFORE THE TRIAL, YOU ASKED THE COURT TO BE ALLOWED TO WITHDRAW?

A. YES, SIR.

Q. UH – FOR WHAT REASON DID YOU ASK THE COURT TO TAKE THAT ACTION?

A. I DID NOT REALIZE THE TRIAL WAS GOING TO LAST THE LENGTH OF TIME THAT IT HAD BEEN – UH – SCHEDULED AND I HAD A LOT OF OTHER COMMITMENTS AND I TOLD MR. MONAHAN THAT I REALLY COULD NOT DO IT.

Q. AND IS THIS A FAIR STATEMENT THAT IN VIEW OF THE FACT THAT YOU HAD DONE NOTHING, DID YOU FEEL LIKE YOU COULD CONTRIBUTE ANYTHING TO THIS TRIAL, GUILT OR PENALTY PHASE?

A. I PROBABLY COULD HAVE HELPED HIM – UH – PICK THE JURY AND, YOU KNOW, DO THE TRIAL PART. GIVE HIM COMMENTS AS TO WHAT I THOUGHT.

Q. AND AS FAR AS YOU KNOW WAS THERE ANY INVESTIGATION DONE FOR THE PURPOSES OF THE PENALTY PHASE ON BEHALF OF WALTER KOON?

MR. NEVELS: OBJECTION, YOUR HONOR.

MR. DALTON: I SAID, AS FAR AS SHE KNOWS.

A. YEAH, NOT BY MYSELF.

BY MR. DALTON:

Q. DO YOU KNOW OF ANYBODY ELSE THAT DID?

A. NO, SIR.

Q. THANK YOU, MISS VINET.

[9] CROSS-EXAMINATION:

BY MR. NEVELS:

Q. MISS VINET, YOU WERE FAMILIAR OR WHAT WAS YOUR RELATIONSHIP WITH MR. MONAHAN AT THIS TIME?

A. HE HAD PRACTICED LAW WITH MY FIRM FOR A NUMBER OF YEARS AND UH – WE

CONTINUED THE – UH OUR RELATIONSHIP, WORKING RELATIONSHIP.

Q. AND THAT WAS A CIVIL FIRM OR A CRIMINAL FIRM? COULD YOU TELL US A LITTLE BIT ABOUT THAT?

A. IT WAS MAINLY CIVIL – UH – WHEN HE – PRACTICED WITH OUR FIRM, BUT HE DID START BRANCHING OUT INTO THE CRIMINAL BEFORE HE LEFT.

Q. OKAY. WERE YOU FAMILIAR WITH OTHER CRIMINAL CASES THAT MR. MONAHAN HAD TRIED DURING PERIOD – 1994-1995?

A. YES.

Q. SPECIFICALLY, WERE YOU FAMILIAR WITH THE ***MILTON HOLLIDAY*** CASE – A DOUBLE MURDER HERE IN BATON ROUGE?

A. YES, I REMEMBER HE HAD THE CASE. I DIDN'T PARTICIPATE IN THAT CASE.

Q. WERE YOU PRIVY – YOU SAID YOU ACTED AS COUNSEL FOR THREE TO SIX MONTHS – WERE YOU PRIVY TO ANY OF THE DISCUSSIONS WITH MR. MONAHAN ABOUT THE STRATEGY HE WOULD USE AT TRIAL FOR MR. KOON?

A. NO.

Q. YOU SAY THAT YOU WERE APPOINTED TO ASSIST WITH THE TRIAL OF MR. KOON. CAN

YOU BE MORE SPECIFIC. WERE YOU ASKED BY MR. MONAHAN TO WORK ON ANY PARTICULAR PART OF THE TRIAL?

A. NO, I WAS NOT ASSIGNED TO ANY PARTICULAR PART. I WAS JUST GOING TO SIT IN AND LIKE I SAID, MAYBE, ASSIST WITH PICKING THE JURY AND THEN GIVING HIM COMMENTS AS THE TRIAL WOULD GO ON.

Q. IS THAT BECAUSE YOU UNDERSTOOD THAT THE JURY SELECTION WOULD PROBABLY BE THE LENGTHIEST PART OF THE TRIAL?

A. YES.

[10] Q. AND IN YOUR EXPERIENCE, IS THAT A VERY IMPORTANT PART OF THE TRIAL?

A. YES.

Q. LET'S TALK ABOUT – YOU GOT OFF THE CASE. TELL ME ABOUT YOUR CIVIL PRACTICE AT THIS TIME. WHAT WAS GOING ON?

A. UH – I JUST HAD A LOT OF THINGS SCHEDULED DURING THAT TIME. I HAD –

Q. DID YOUR FATHER – IT WAS VINET AND VINET?

A. YES.

Q. WAS THAT YOU FATHER?

A. YES.

Q. WAS HE RETIRING DURING THIS TIME?

A. NO, UH-UH.

Q. WERE YOU TAKING ON MORE RESPONSIBILITIES IN THAT FIRM?

A. YES, I ALWAYS DID. AS SOON AS I STARTED PRACTICING, I PRETTY MUCH TOOK OVER.

Q. NOW MR. DALTON ASKED YOU ABOUT THE PENALTY PHASE. DO YOU HAVE ANY KNOWLEDGE OF WHAT MR. MONAHAN'S TRIAL STRATEGY WAS AS FAR AS THAT WAS CONCERNED?

A. NO, I DIDN'T. I REALLY DIDN'T.

Q. ALTHOUGH YOU WERE REMOVED FROM THE CASE, DID YOU OBSERVE THE TRIAL AT ANY POINT?

A. NO, I DID NOT.

Q. DID YOU – YOU SAID YOU THOUGHT THE TRIAL WOULD ONLY TAKE – THAT YOU DIDN'T THINK THE TRIAL WOULD TAKE TWO WEEKS. HOW LONG DID YOU THINK THE TRIAL WAS GOING TO TAKE?

A. I THOUGHT IT WOULD BE OVER AT THE END OF THE WEEK?

Q. AND WHY WAS THAT?

A. I GUESS MONAHAN DIDN'T KEY ME IN ON WHAT WAS REALLY GOING ON WITH THAT PART.

Q. WERE YOU AWARE OF THE FACTS OF THE CASE?

A. YES.

[11] Q. FROM YOUR OBSERVATION, DO YOU THINK THAT MR. MONAHAN DID A GOOD JOB FOR MR. KOON?

MR. DALTON: OBJECTION, I DON'T THINK SHE'S QUALIFIED TO ANSWER THAT QUESTIONS, YOUR HONOR.

THE COURT: I GUESS SHE CAN ANSWER IT FROM HER OWN POINT OF VIEW, BUT I DON'T HAVE ANY IMPRESSION THAT SHE HAD TOO MUCH KNOWLEDGE OF WHAT HE WAS DOING.

A. I, I DON'T HAVE ANY KNOWLEDGE OF WHAT HE DID DURING THE TRIAL, BUT I DO KNOW HIS – I HAVE SEEN HIM DO MANY CASES – TRY MANY CASES AND HE'S AN EXCELLENT ATTORNEY.

Q. SO AT THE TIME MR. MONAHAN WAS APPOINTED TO REPRESENT MR. KOON, HE HAD TRIED OTHER CRIMINAL CASES?

A. YES.

Q. AND HE WAS AN EXPERIENCED CRIMINAL ATTORNEY IN YOUR OPINION?

A. OH, YES.

Q. AND YOU – WOULD YOU HAVE WITHDRAWN FROM THIS CASE OR SOUGHT TO HAVE WITHDRAWN IF YOU HAD ANY DOUBT THAT MR. MONAHAN COULDN'T COMPETENTLY REPRESENT MR. KOON?

A. ABSOLUTELY NOT.

Q. IN FACT, IF YOU HAD HAD ANY CONCERN IN YOUR MIND, WOULD YOU HAVE REQUESTED THE COURT TO DO SOMETHING TO EITHER PROVIDE HIM WITH ANOTHER COUNSEL?

A. YES.

Q. OR ASK THAT THE TRIAL BE CONTINUED OR, OR SOMETHING ELSE?

A. YES.

Q. DID YOU HAVE ANY RESERVATIONS IN SEEKING TO BE REMOVED FROM THIS CASE?

A. NONE WHATSOEVER.

Q. OKAY, DO YOU HAVE ANY AT THIS TIME.

A. NO, I DO NOT.

Q. THANK YOU, MA'AM.

[12] REDIRECT EXAMINATION:

BY MR. DALTON:

Q. MISS VINET, WHEN YOU WERE APPOINTED, DID THE COURT ASSIGN YOU ANY CAPACITY IN THIS CAPITAL TRIAL AS TO GUILT OR PENALTY PHASE?

A. NO, SIR.

Q. AND IF I RECOLLECT YOUR DIRECT TESTIMONY, YOU SAID MR. MONAHAN DIDN'T EITHER. HE DID NOT TELL YOU THAT YOU WOULD HANDLE THE PENALTY PHASE, IS THAT CORRECT?

A. THAT'S CORRECT.

Q. SO WHILE YOU WERE IN THE CAPACITY OF APPOINTED ATTORNEY FOR SIX MONTHS – UH – DID YOU EVER NOTIFY THE COURT –

A. GIVE OR TAKE, I'M NOT REALLY SURE OF THE LENGTH OF TIME.

Q. – DID YOU EVER NOTIFY THE COURT THAT YOU HAD NOT BEEN ASSIGNED ANY POSITION INT HIS TRIAL?

A. NO, SIR.

Q. THANK YOU.

MR. NEVELS: JUST A COUPLE OF QUESTIONS, JUDGE, BROUGHT UP BY THAT.

[13] RECROSS-EXAMINATION: BY MR. NEVELS:

Q. WERE YOU APPOINTED BY JUDGE ERWIN IN THIS CASE?

A. UH – YES, I BELIEVE, I BELIEVE SO.

Q. YOU WERE NOT – WHO WERE YOU APPROACHED BY WHEN YOU WERE ACTUALLY APPOINTED?

A. I WAS ASKED BY KEVIN MONAHAN TO, TO ASSIST.

Q. IT WASN'T A SITUATION WHERE YOU WERE ON ANY KIND OF APPOINTMENT BOARD OR ANYTHING LIKE THAT?

A. NO.

Q. OKAY, SO IT WAS THROUGH MR. MONAHAN THAT YOU GOT IN ON THE CASE/

A. YES.

Q. SO IT WAS NOT A SITUATION, OBVIOUSLY, THEN WHERE THE SUPREME COURT FILL OUT ANY REQUIREMENTS TO, TO ACT AS COUNSEL OR ANYTHING LIKE THAT?

A. THAT'S CORRECT.

Q. AND HAVE YOU EVER HAD IN YOUR EXPERIENCE WHERE EITHER A JUDGE OR A CO-COUNSEL TELLS YOU THAT YOU'RE ONLY GOING TO BE RESPONSIBLE FOR A CERATIN PORTION OF TRIAL>

A. NEVER.

Q. YOU'RE THERE FOR THE DURATION IF YOU'RE GOING TO BE ON THE CASE, RIGHT?

A. THAT'S TRUE.

Q. OKAY, THANK YOU.

THE COURT: MR. DALTON, DO YOU HAVE ANOTHER QUESTION?

MR. DALTON: JUST TWO, YOUR HONOR.

THE COURT: JUST TWO, I MIGHT HOLD YOU TO THAT.

MR. DALTON: THANK YOU.

[14] SIR-REDIRECT EXAMINATION:

BY MR. DALTON:

Q. MISS VINET, DID YOU EVER DISCUSS WITH WALTER KOON THAT YOU WERE GOING TO ASK TO BE WITHDRAWN OR ALLOWED TO BE WITHDRAWN FROM THIS CASE?

A. I THINK THAT BEFORE THE JUDGE CALLED ME UP, WE HAD MAYBE SPOKE TO HIM AND HE, HE WANTED TO GO FORWARD WITH THE CASE.

Q. DID YOU – ARE YOU AWARE OF THE SUPREME COURT RULE THAT RECOMMENDS THAT TWO ATTORNEYS BE APPOINTED TO A

CAPITAL CASE, ON ASSIGNED TO THE GUILT AND ONE ASSIGNED TO THE PENALTY PHASE? WERE YOU AWARE OF THAT RULE?

A. NOT AT THAT TIME, I WAS NOT.

Q. OKAY.

MR. NEVELS: I WOULD – IT'S A BELATED OBJECTION, BUT I DON'T THINK THAT THAT'S APPROPRIATE CHARACTERIZATION OF THAT RULE.

THE COURT: WHAT DO YOU THINK IT IS?

MR. NEVELS: WELL, THERE IS, THERE IS A RULE THAT – AND I DON'T KNOW IF THAT RULE WAS IN EFFECT EVEN AT THE TIME OF THIS TRIAL, BUT THERE IS A SUPREME COURT RULE THAT TWO ATTORNEYS BE APPOINTED. HOWEVER, IT IS THE UNDERSTANDING THAT THAT APPOINTMENT COMES IN CONTEXT OF THE INDIGENT ASSISTANCE BOARD OR WHATEVER IT WAS CALLED AT THAT TIME AND NOT IN THE SITUATION THAT WE HAVE IN THIS CASE WHERE YOU APPOINTED MR. MONAHAN AND THEN MR. MONAHAN SOUGHT OUT HIS OWN COUNSEL.

THE COURT: MR. DALTON?

MR. DALTON: I'VE GOT NO COME BACK TO THAT, YOUR HONOR, OTHER THAN THE SUPREME COURT OBVIOUSLY THINKS THAT IT

– TWO ATTORNEYS OUGHT TO BE APPOINTED IN A CAPITAL CASE.

BY THE COURT:

[15] Q. MISS VINET, LET ME ASK YOU A COUPLE OF QUESTIONS AND SEE IF YOU KNOW THE ANSWER?

A. OKAY.

Q. ACTUALLY, I SAY A COUPLE, BUT IT MAY BE MORE. DO YOU KNOW HOW MR. MONAHAN BECAME INVOLVED IN THIS CASE?

A. MY KNOWLEDGE IS THAT MR. KOON – UH – SOUGHT HIS SERVICES.

Q. AND AS I UNDERSTAND OR APPRECIATE YOUR TESTIMONY, YOU THOUGHT THAT, BASICALLY, WHAT YOU WERE GOING TO DO IS COME DOWN HERE AND SIT AT THE TRIAL AND BE SOME TYPE OF TRIAL ADVISOR?

A. YES, SIR.

Q. AND IT WASN'T YOUR INTENTION TO HELP PREPARE THE CASE IN EITHER THE GUILT OR THE INNOCENT – IN EITHER THE GUILT OR THE PENALTY PHASE?

A. THAT'S TRUE.

Q. AND LET ME ASK YOU THIS, HOW MANY CIVIL JURY TRIALS HAVE YOU TRIED?

A. PROBABLY FIFTY.

Q. AND MAYBE AT THAT TIME HOW MANY, LET ME ASK YOU THAT?

A. PROBABLY ABOUT THIRTY.

Q. YOU FELT THAT YOUR LEGAL ASSISTANCE IN THIS WOULD BE DURING THE SELECTION OF THE JURY TRIAL AND DURING THE TRIAL ITSELF BY JUST POINTING THINGS OUT TO MR. MONAHAN?

A. YES, SIR, THAT'S TRUE.

Q. THAT'S WHAT YOU THOUGHT YOU WERE GOING TO BE DOING?

A. THAT'S WHAT I THOUGHT I WAS GOING TO DO.

THE COURT: ALL RIGHT, ANYBODY HAVE ANY QUESTIONS NOW IN LIGHT OF THE ONES I'VE ASKED?

MR. NEVELS: NO, YOUR HONOR.

THE COURT: ALL RIGHT, YOU CAN STEP DOWN MA'AM. WITNESS EXCUSED

THE COURT: IS SHE FREE TO GO?

MR. DALTON: YES, SIR.

[16] THE COURT: ALL RIGHT, THANK YOU.

MR. DALTON: CALL KEVIN MONAHAN.

THE COURT: CALL MR. MONAHAN. MISS VINET –

MISS VINET: YES, SIR.

THE COURT: IF YOU'RE GOING TO STAY, YOU'RE GOING TO HAVE TO REMAIN UNDER THE RULE OF SEQUESTRATION. SO YOU CAN'T SIT IN THE COURTROOM UNLESS EITHER SIDE AGREES TO EXCUSE YOU.

MR. NEVELS: I'VE GOT NO PROBLEM, JUDGE.

MR. DALTON: I'VE GOT NO PROBLEM.

[17] KEVIN MONAHAN CALLED AS A WITNESS ON BEHALF OF THE DEFENSE, HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:

THE COURT: MR. DALTON, MR. MONAHAN, BEFORE WE GO ANY FURTHER, IT'S BEEN BROUGHT TO MY ATTENTION AND I GUESS I SHOULD HAVE THOUGHT ABOUT IT BEFORE, BUT I DIDN'T. THERE EXISTED AT ONE POINT AN ATTORNEY-CLIENT PRIVILEGE BETWEEN MR. MONAHAN AND MR. KOON. AND I'VE GOT A FEELING A LOT OF WHAT WE'RE GOING TO HEAR ABOUT WOULD COME UNDER THAT PRIVILEGE, UNLESS MR. KOON IS WILLING TO WAIVE THAT PRIVILEGE.

MR. NEVELS: JUDGE, I'D SUBMIT THAT IT'S WAIVED OUTRIGHT BY VIRTUE OF THIS PETITION AND BY VIRTUE OF THE AFFIDAVIT

ALREADY SUBMITTED BY MR. KOON, THAT HE'S WAIVED THAT PRIVILEGE.

THE COURT: WELL –

MR. NEVELS: ONCE YOU'VE WAIVED IT IN PART, YOU'VE WAIVED IT IN FULL AND I DON'T THINK THAT THAT'S SOMETHING THAT HE CAN SELECTIVELY WAIVE; HOWEVER, JUDGE, I WOULD ASK THAT YOU DO CLARIFY IT FOR THE RECORD?

THE COURT: – THAT'S WHAT WE'RE GOING TO DO, TO MAKE SURE THAT WE DON'T HAVE A PROBLEM. MR. KOON –

MR. DALTON: MR. KOON PLACES ON THE RECORD IN OPEN COURT THAT HE WAIVES ANY PRIVILEGE OF ATTORNEY-CLIENT RELATIONSHIP WHICH COULD HAVE OR MAY HAVE EXISTED BETWEEN HIM AND MR. MONAHAN.

THE COURT: MR. KOON, LET ME ASK YOU A QUESTION OR TWO ABOUT THAT. YOU UNDERSTAND THAT THE INFORMATION THAT YOU AND MR. MONAHAN EXCHANGED WHEN YOU WERE HIS CLIENT IS PRIVILEGED AND HE IS NOT ALLOWED TO, TO DISCUSS THAT WITH OTHER PEOPLE WITHOUT YOUR PERMISSION? DO YOU UNDERSTAND THAT?

[18] MR. KOON: YES, SIR.

THE COURT: AT THIS POINT, YOU HAVE MADE SOME ALLEGATIONS THROUGH YOUR OTHER ATTORNEYS THAT MR. MONAHAN – UH – DID NOT CONDUCT YOUR TRIAL IN AN EFFECTIVE MANNER AND HAD HE DONE SO, YOU WOULD NOT HAVE BEEN CONVICTED. AND YOU'VE CALLED HIM AS A WITNESS TO DISCUSS THAT. TO DO SO, HE'S GOING TO PROBABLY HAVE TO SAY THINGS THAT, THAT YOU AND HIM DISCUSSED THAT WERE PRIVILEGED AT THE TIME THOSE DISCUSSIONS TOOK PLACE?

MR. KOON: YES, SIR.

THE COURT: AND YOU'RE WILLING TO WAIVE THAT PRIVILEGE AND LET MR. MONAHAN GET UP HERE AND TESTIFY?

MR. KOON: YES, SIR.

THE COURT: ALL RIGHT.

DIRECT EXAMINATION

BY MR. DALTON:

Q. MR. MONAHAN, I'M SAM DALTON.

A. GOOD MORNING.

Q. I'VE BEEN APPOINTED TO REPRESENT MR. KOON IN THESE POST-CONVICTION PROCEEDINGS. UH – MY FIRST QUESTION TO YOU,

WOULD YOU PLEASE DISCLOSE HOW YOU CAME TO REPRESENT WALTER KOON IN THIS PARTICULAR SITUATION?

A. I WAS APPROACHED BY CARL BABIN, WHO WAS A LAW CLERK TO JUDGE ERWIN, ASKING ME IF I WOULD UNDERTAKE THE REPRESENTATION OF JOEY KOON WHOSE CURRENT PUBLIC DEFENDER, DAVID BUCKLEY, HE WAS VERY DISSATISFIED WITH AND WOULD I ACCEPT THE REPRESENTATION, AND I ACCEPTED IT.

Q. DID YOU HAVE ANY DISCUSSIONS WITH MR. KOON ABOUT WHY HE WAS DISSATISFIED WITH THE PUBLIC DEFENDER?

A. PRIOR TO MY REPRESENTATION OR AFTER?

Q. AFTER?

A. GENERALLY.

[19] Q. AND WHAT WAS THE SUBSTANCE OF THOSE DISCUSSIONS?

A. HE DID NOT FEEL BUCKLEY WAS QUALIFIED.

Q. IS THERE A REASON FOR THAT? DID HE GIVE YOU A REASON FOR THAT?

A. I THINK JUST HIS GENERAL APPEARANCE AND THE WAY HE TALKED TO MR. KOON DID NOT ALLEVIATE ANY OF MR. KOON'S FEAR

ABOUT WHAT WAS UPCOMING AS FAR AS THE TRIAL.

Q. AND DID YOU DISCUSS THAT WITH MR. BUCKLEY?

A. NO, MR. BUCKLEY HAD ALREADY BEEN TERMINATED. SO YOUR QUESTION WAS, DID I HAVE A CONVERSATION WITH MR. KOON. IT WAS AFTER I UNDERTOOK THE REPRESENTATION AS TO WHY HE WAS DISSATISFIED WITH DAVID BUCKLEY, BUT I NEVER WENT TO DAVID BUCKLEY AND SAID, OH, WELL, JOEY KOON TOLD ME –

Q. IF I –

A. – YOU WERE OVERWEIGHT AND DIDN'T DRESS CORRECTLY.

Q. – IF I INFORMED YOU THAT THE COURT, WHEN THE COURT APPOINTED YOU, SPECIFICALLY, KEPT THE PUBLIC DEFENDER ON UNTIL SUCH TIME AS MISS VINET WAS APPOINTED. DO YOU REMEMBER THAT OR DO YOU DISPUTE THAT?

A. I WAS TOLD I HAD ACCESS TO THE PUBLIC DEFENDER'S PRIVATE INVESTIGATOR, BUT IT WASN'T MY UNDERSTANDING THAT DAVID BUCKLEY WAS STILL CO-COUNSEL.

Q. OKAY. NOW AT THE TIME THAT YOU AGREED TO REPRESENT MR. KOON, WERE THERE ANY FINANCIAL CONDITIONS?

A. NO.

Q. ON THAT REPRESENTATION?

A. NO.

Q. YOU WERE TAKING IT AS AN APPOINTED COUNSEL?

A. YES.

Q. DID YOU EXPECT TO GET PAID FROM THE STATE?

A. IF I SUBMITTED A TIME SHEET, I WOULD EXPECT TO GET PAID.

Q. AND DID YOU?

[20] A. I RESERVED MY RIGHT AS TO WHETHER OR NOT I WAS GOING TO DONATE MY SERVICES PRO BONO OR WHETHER OR NOT I WOULD KEEP TRACK OF THE LEGAL TIME AND SUBMIT THAT TO THE STATE.

Q. AND DID YOU, IN FACT, BILL FOR ANY OF YOUR SERVICES TO THE STATE?

A. NO, I DID NOT. I PRO BONOED MY TIME TO THE STATE OF LOUISIANA. I FEEL MORE LAWYERS SHOULD DO THAT.

Q. OKAY. NOW AFTER YOU AGREED TO REPRESENT WALTER KOON AND YOU ENTERED THE REPRESENTATION, WHEN DID YOU BECOME AWARE OF THE POLICE INFORMATION?

A. YOU'RE GOING TO HAVE TO SPEAK UP A LITTLE LOUDER, MR. DALTON, I CAN'T –

Q. WHEN DID YOU BECOME AWARE OF THE POLICE INFORMATION?

A. – I'M NOT UNDERSTANDING THE WORD POLICE AFFIRMATION?

Q. POLICE – THE POLICE DEPARTMENT'S INFORMATION?

A. INFORMATION?

Q. YES.

A. YOU MEAN THE INFORMATION ABOUT THE CASE?

Q. YES.

A. BY REVIEWING THE FILE AND TALKING WITH PEOPLE ABOUT THE FACTS.

Q. YES, OR EVEN GETTING THE POLICE REPORT?

A. SIR?

Q. PROCURING THE POLICE REPORT?

A. YES, SIR, FILING FOR INITIAL OFFENSE REPORTS.

Q. ALL RIGHT, NOW AFTER YOU REVIEWED THE POLICE REPORT AND YOU CONSULTED WITH WALTER KOON, DID YOU ADOPT THE THEORY OF DEFENSE?

A. IT WAS PROBABLY WHEN I FIRST TALKED TO MR. KOON. I DON'T KNOW IF YOU WOULD SAY IT WAS THE POLICE REPORTS AND THEN MR. KOON OR IF IT WAS MR. KOON AND THEN THE POLICE REPORTS. BUT AT SOME POINT IN TIME, I ADOPTED A THEORY BASED ON WHAT HE TOLD ME.

[21] Q. AND WHAT WAS THAT THEORY?

A. THAT HE HAD GONE TO HIS WIFE'S PARENT'S HOUSE TO RETURN HALF THE PROCEEDS FROM THE SALE OF AN EL CAMINO AND WHEN SHE LAUGHED AT HIM AND WALKED AWAY, AND THE MOTHER MADE A COMMENT TO HIM, HE EXPLODED AND GOT ENRAGED AND SHOT AND KILLED THEM IN A HEAT OF PASSION.

Q. SO, BASICALLY, YOU ADOPTED A MANSLAUGHTER-TYPE THEORY?

A. MANSLAUGHTER COUPLED WITH THE FACT THAT HE ADVISED ME THAT HE HAD BE INGESTING LARGE QUANTITIES OF THE DRUG ZANAX.

Q. ALL RIGHT.

A. AND THAT I FELT THAT IF HE HAD NOT HAD ZANAX THAT MORNING, AS HE TOLD HE HAD NOT, THAT I NEEDED TO INVESTIGATE THAT WITH A PHARMACOLOGIST TO DETERMINE WHAT EFFECT THAT WOULD HAVE ON SOMEONE'S ABILITY TO CONTROL THAT RAGE.

Q. ALL RIGHT.

A. LACK OF SPECIFIC INTENT.

Q. YOUR THEORY WAS THAT THERE WAS NO SPECIFIC INTENT AVAILABLE IN THIS CASE TO, TO THE STATE?

A. YES.

Q. NOW, WHEN YOU REVIEWED THE POLICE REPORT –

A. WHICH REPORT? IF YOU COULD SHOW ME WHICH REPORT YOU'RE TALKING ABOUT?

Q. – I'LL SHOW YOU AN INSTRUMENT MARKED KOON 1 FOR IDENTIFICATION AND ASK YOU TO –

REPORTER: I'M SORRY, MR. DALTON, BUT I CAN'T HEAR YOU.

MR. DALTON: I'M SORRY.

BY MR. DALTON:

Q. I SHOW YOU INSTRUMENT MARKED KOON 1 FOR IDENTIFICATION.

A. YES, SIR.

Q. AND ASK YOU TO REVIEW THAT AND LET ME KNOW WHAT INFORMATION WAS AVAILABLE TO YOU BEFORE THE TRIAL THAT'S [22] CONTAINED IN THAT REPORT?

A. I DON'T UNDERSTAND YOUR QUESTION.

Q. WELL THEN, LET ME GET SPECIFIC.

A. OKAY.

Q. FROM THE POLICE INFORMATION THAT YOU SECURED, WERE YOU AWARE THAT MICHELLE KOON WAS SHOT TWICE?

(REPORTER'S NOTE: THERE WAS A PAUSE IN THE PROCEEDINGS WHILE THE WITNESS READ FROM THE DOCUMENT HANDED TO HIM BY MR. DALTON.)

MR. NEVELS: JUDGE, WHILE MR. MONAHAN IS READING, I'LL JUST OBJECT TO THE RELEVANCE OF THIS QUESTION.

THE COURT: I'LL OVERRULE YOUR OBJECTION.

BY MR. DALTON:

Q. WELL MAYBE WE CAN SAVE TIME BY ME REPHRASING THE QUESTION. MR. MONAHAN.

A. YES, SIR.

Q. DID YOU EVER BECOME AWARE PRIOR TO TRIAL THAT MICHELLE KOON WAS SHOT TWICE?

A. I WOULD THINK YES.

Q. YOU THINK?

MR. NEVELS: JUDGE, I THINK THE RECORD WILL SPEAK FOR ITSELF.

THE COURT: I DON'T EVEN REMEMBER AND I HEARD THE EVIDENCE.

MR. NEVELS: SHE WAS SHOT ONCE IN THE BACK, I BELIEVE, AND THEN ONCE IN THE HEAD, AND THE AUTOPSY –

THE COURT: CAN WE, FOR THE SAKE OF THIS HEARING, ASSUME – WE CAN SAY THAT SHE WAS SHOT TWICE.

MR. DALTON: ALL RIGHT.

MR. NEVELS: JUDGE, I THINK THAT IN THE RECORD IT IS – CORONER'S RECORD –

THE COURT: SHE WAS SHOT TWICE. NOW MAKE YOUR [23] POINT AS TO WHAT THAT MEANS, AS TO WHETHER OR NOT SHE WAS SHOT TWICE.

MR. DALTON: ALL RIGHT.

A. I'LL AGREE, SHE WAS SHOT TWICE.

BY MR. DALTON:

Q. YOU WILL WHAT?

A. I'LL SAY SHE WAS SHOT TWICE.

Q. ALL RIGHT, AND ARE YOU AWARE OF THE LOUISIANA JURISPRUDENCE THAT CONSIDERS A SECOND BULLET PRESUMPTIVE EVIDENCE OF INTENT – SPECIFIC INTENT –

MR. NEVELS: JUDGE, THAT –

BY MR. DALTON:

Q. – TO DO GREAT BODILY HARM?

MR. NEVELS: – CALLS FOR A LEGAL CONCLUSION.

THE COURT: HE'S A LAWYER.

MR. DALTON: HE'S A LAWYER. I'M ASKING IF HE –

THE COURT: THAT'S WHAT WE'RE HERE FOR TODAY, TO DETERMINE LEGAL CONCLUSION.

MR. NEVELS: AGAIN, THAT'S HIS INTERPRETATION OF THE LAW AND IT'S UP TO MR. MONAHAN TO HAVE –

BY MR. DALTON:

Q. DID YOU ALSO HAVE –

MR. NEVELS: – IT'S ALSO UP TO THE PARTICULAR FACTS OF THE CASE AND TO ALSO TO THE PARTICULAR DISCRETION OF AN ATTORNEY AND HOW HE INTERPRETS THAT LAW.

THE COURT: I'M GOING TO LET MR. DALTON ASK HIS QUESTION.

MR. DALTON: THANK YOU, YOUR HONOR.

A. NO.

BY MR. DALTON:

Q. NOW, DID YOU BECOME AWARE PRIOR TO TRIAL THAT RICHARD [24] GUIDRY WAS SHOT AT LEAST THREE TIMES?

A. YES.

Q. AND DID YOU BECOME AWARE THAT FAYE GUIDRY WHO WAS SHOT IN THE HEAD WHILE SHE WAS TALKING TO 911?

A. YES.

Q. NOW, DID YOU CONSIDER ANY OTHER AVAILABLE DEFENSES IN THIS MATTER OTHER THAN MANSLAUGHTER?

A. I CONSIDERED VARIOUS STRATEGIES.

Q. WOULD YOU LIST THEM?

A. ONE WOULD BE TO GIVE IN ON FIRST DEGREE MURDER AND CONCENTRATE ON THE PENALTY PHASE OR CONCENTRATE ON THE GUILT PHASE. I DECIDED TO CONCENTRATE ON THE GUILT PHASE OF MANSLAUGHTER BECAUSE OF HIS REPEATED STATEMENTS OF, THEY PUSHED ME TOO FAR; THEY PUSHED ME

TOO FAR; I SNAPPED. AND I FELT THAT THAT WAS SOMEBODY WHO HAD JUST COMPLETELY LOST IT AND DID NOT HAVE THE INTENT AND JUST WENT, BASICALLY, CRAZY.

Q. DID YOU EVER DISCUSS WITH MR. KOON THE POSSIBILITY OF ADOPTING THE FIRST STRATEGY YOU MENTIONED WHICH WAS –

A. YES.

Q. – TO STAND UP AND ADMIT GUILT? AND WHAT WAS THE RESULT OF THAT CONVERSATION?

A. HE DENIED HE HAD THE INTENT TO DO THAT. HE DENIED THAT. HE WAS JUST OVERCOME BY THE FACT THAT THEY LAUGHED AT HIM AT THE CARPORT.

Q. UH-HUH.

A. AND THAT HE IN NO WAY, SHAPE OR FORM HAD THE INTENT OF THAT WHEN HE WENT OVER THERE – TO KILL HER.

Q. UH-HUH. ALL RIGHT, AND YOU BECAME AWARE OF HIS ACTIONS AFTER THE KILLINGS?

A. I BECAME AWARE OF HIS ACTIONS AFTER THE KILLING?

Q. YES.

A. WELL, YEAH, I HEARD ABOUT THE CASE AFTER THE KILLING.

[25] Q. NOW, WERE YOU AWARE THAT HE DROVE HOME FROM THE POINT OF THE KILLINGS AND –

A. YES, I WAS AWARE THAT HE DROVE HOME AND CALLED THE LIVINGSTON PARISH SHERIFF'S OFFICE.

Q. – AND WAS DRINKING BEER?

A. YES.

Q. AND – UH –

A. AND HAD PHONED HIS MOTHER.

Q. – OKAY, AND THAT HE PHONED HIS MOTHER?

A. YES.

Q. AND THAT THERE WAS A STATEMENT MADE TO HIS MOTHER THAT THIS WAS NO ACCIDENT. WERE YOU AWARE OF THAT?

A. HE DENIED THAT STATEMENT. IN FACT, WE HAD A MOTION TO SUPPRESS OVER HIS STATEMENTS TO THE LIVINGSTON PARISH SHERIFF'S OFFICE AS WELL AS THE BATON ROUGE POLICE DEPARTMENT. AND HE, MR. KOON, VEHEMENTLY DENIED THAT HE EVER MADE THE STATEMENT ON THAT PHONE AND THAT DETECTIVE PAT HALEY WAS A LIAR AND

THAT HE WAS THE QUOTE "SLACKEY" – GOING TO BE THE ONE FROM THAT GROUP TO LIE ON HIM.

Q. UH-HUH.

A. SO, YES, WE WENT AROUND AND AROUND ABOUT THAT DISCUSSION. HE SAID NO WAY SHAPE OR FORM DID HE TELL HIS MOTHER THAT. THAT THEY WERE LYING ABOUT THE SUBSTANCE OF THAT PHONE CALL SO THAT THEY WOULD SUPPLY THE INTENT ON HIM. SO, YES, TO ANSWER YOUR QUESTION, I WAS VERY MUCH AWARE OF THE ISSUE OVER THE INTENT AND THAT PHONE CALL.

Q. OKAY. MR. MONAHAN – UH – WHEN YOU ADOPTED THE MANSLAUGHTER THEORY OF DEFENSE, YOU SAID YOU WERE GOING TO CONCENTRATE ON THE GUILT PHASE INSTEAD OF THE PENALTY PHASE. IS THAT TRUE?

A. I DON'T KNOW ABOUT INSTEAD OF, BUT IN ADDITION TO, NOT GIVING UP. MY THEORY HAD BEEN, AND I WAS SUCCESSFUL ON THE ONE [26] BEFORE, IN THAT I DIDN'T NECESSARILY AGREE WITH A LOT OF WAYS LAWYERS WERE HANDLING DEATH PENALTY CASES IN THIS PARISH BY AUTOMATICALLY GIVING UP THE GUILT PHASE AND CONCENTRATING ON THE PENALTY PHASE. AND I WAS SUCCESSFUL ON ONE BEFORE AND I THOUGHT I COULD BE SUCCESSFUL ON THIS ONE.

Q. IS IT YOUR POSITION THAT YOU DON'T NEED TWO ATTORNEYS FOR A CAPITAL CASE, ONE FOR PENALTY PHASE AND ONE FOR GUILT?

A. MY POSITION AS I SIT HERE TODAY OR MY POSITION AT THE TIME IN 1993 AND 1995 AND 1991?

Q. YOUR POSITION AT THE TIME YOU TRIED THIS CASE?

A. MY POSITION AT THE TIME I TRIED THIS CASE WAS THAT I COULD HANDLE IT.

Q. AND THIS IS WHAT YOU INFORMED THE COURT THE DAY THAT MISS VINET WITHDREW?

A. YES.

Q. THAT YOU COULD HANDLE IT?

A. YES, SIR.

Q. DID YOU HAVE ANY DISCUSSIONS WITH WALTER KOON ABOUT THE DANGERS OF NOT HAVING A SECOND ATTORNEY FOR THE PENALTY PHASE?

A. DANGERS, I DON'T KNOW IF I COULD EVEN KNOW WHAT YOU MEAN BY DANGERS, BUT I WOULD RESPOND THAT –

Q. LET ME, LET ME CHANGE THAT –

A. – I – WELL, LET ME TELL YOU JUST WHAT I ASKED HIM AT THE TABLE. I SAID, WE COULD GET A CONTINUANCE RIGHT NOW IF YOU WANT ONE. HE SAID, NO, WE'RE READY. I WANT TO GET THIS OVER WITH. I WANT TO GO.

Q. AND YOU DIDN'T ADVISE HIM OTHERWISE?

A. NO, I DID NOT.

Q. AND AT THAT POINT YOU INFORMED THE COURT THAT YOU WERE READY AND COULD TRY THE PENALTY PHASE?

A. YES.

Q. NOW, AT THAT POINT AND AS OF THAT POINT, WHAT HAD YOU DONE [27] TO PREPARE FOR A PENALTY PHASE IN THIS MATTER?

MR. NEVELS: WAIT, JUDGE, I'M SORRY, I JUST NEED TO CLARIFY. I THINK MISS VINET WAS REMOVED BEFORE THE GUILT PHASE OF TRIAL AND, AND I DON'T KNOW MR. DALTON IS NOW TAKING IT TO PENALTY PHASE. I DON'T, I DON'T QUITE UNDERSTAND.

BY MR. DALTON:

Q. NO, I'M SAYING THE MORNING THAT TRIAL BEGAN I THINK MISS VINET WITHDREW AND AT THAT POINT YOU ANNOUNCED TO THE COURT THAT YOU COULD HANDLE THE PENALTY PHASE?

A. I COULD HANDLE THE TRIAL, THE WHOLE TRIAL.

Q. YEAH.

A. RIGHT.

Q. INCLUDING THE PENALTY PHASE?

A. YES.

Q. I'M ASKING YOU, AT THAT POINT, WHAT HAD YOU DONE TO PREPARE FOR THE PENALTY PHASE?

A. GOING TO INCORPORATE, IF IT GOT THAT FAR, GOING TO INCORPORATE WHAT I HAD PRESENTED IN THE GUILT PHASE, WHICH WAS THE PSYCHIATRISTS THAT I WAS USING IN THE GUILT PHASE.

Q. UH-HUH. AND DID YOU CONSIDER THAT IF THE JURY DIDN'T BUY YOUR PSYCHIATRISTS IN THE GUILT PHASE IT WOULDN'T IN THE PENALTY PHASE? DID YOU CONSIDER THAT?

A. SAY THAT AGAIN?

Q. DID YOU CONSIDER THAT IF THE JURY DIDN'T BUY YOUR PSYCHIATRISTS IN THE GUILT PHASE IT WOULDN'T IN THE PENALTY PHASE?

A. HIM KNOWING RIGHT FROM WRONG, BUT THEY STILL COULD CONSIDER HIS BACK-GROUND –

Q. UH-HUH.

A. – IN THE PENALTY PHASE.

Q. SO IF –

[28] A. AND I HAD PLANNED ON CALLING HIS MOTHER, HIS BROTHER, AND I BELIEVE A PREACHER WAS GOING TO TESTIFY.

Q. ALL RIGHT, WHEN, WHEN DID YOU INFORM HIS MOTHER THAT SHE WAS GOING TO HAVE TO TESTIFY IN THE PENALTY PHASE?

A. SHE KNEW ALL ALONG.

Q. DID YOU EVER PREPARE HER FOR THE STAND?

A. WHAT DO YOU MEAN PREPARE HER FOR THE STAND?

Q. DID YOU EVER TELL HER HOW TOUGH IT IS TO TESTIFY IN A CRIMINAL CASE ON THE BEHALF OF A MOTHER AND THAT SHE WOULD BE CROSS-EXAMINED?

A. I DON'T THINK I USED THOSE SPECIFIC WORDS, BUT I TOLD HER THAT SHE WOULD BE CROSS-EXAMINED FOR SURE.

Q. UH – DID YOU EVER INFORM MRS. FLORENCE WILLIAMS THAT THE JUDGE TOLD

YOU THAT THERE WOULD BE NO DEATH PENALTY IN THIS CASE? DID YOU EVER INFORM HER OF THAT?

A. NO, BUT I KNOW WHERE THOSE WORDS CAME FROM IF YOU WANT ME TO EXPAND ON IT?

Q. PLEASE?

A. THOSE WORDS CAME AT THE CONCLUSION OF THE MOTION TO SUPPRESS. AT THE CONCLUSION OF THE MOTION TO SUPPRESS THE CASE APPEARED SYMPATHETIC TOWARDS MR. KOON WITHOUT HIM TESTIFYING AND I THINK THE JUDGE OFFHANDLY IN THE HALL SAID, I DOUBT HE'D GET THE DEATH PENALTY. HE SAID THAT TO ME IN PASSING AT THE CONCLUSION OF THE MOTION TO SUPPRESS AND I WOULD HAVE PASSED THAT ON THAT THE JUDGE SAID HE DOUBTED HE'D GET THE PENALTY – HE'D – UH – GET THE DEATH PENALTY BASED ON WHAT HE HEARD IN THE MOTION TO SUPPRESS. BUT I DENY THAT I EVER TOLD MRS. KOON THE JUDGE SAID THERE WILL BE NO DEATH PENALTY.

Q. UH – AND DID YOU INFORM LEE KOON, EVER INFORM LEE KOON THAT THE JUDGE HAD INFORMED MR. MONAHAN, OR YOU, THAT WALTER'S HISTORY OF DRUG ABUSE WOULD BE SUFFICIENT MITIGATING CIRCUMSTANCES AND WOULD NEVER RESULT IN A DEATH PENALTY?

[29] A. NO.

Q. YOU NEVER DID SAY THAT?

A. NO.

Q. HOW MANY FAMILY MEMBERS – UH – OF WALTER KOON DID YOU CONTACT?

A. AT LEAST FOUR.

Q. AND HOW MUCH TIME DID YOU SPEND WITH EACH OF THOSE TO DECIDE WHETHER OR NOT TO PRESENT THEM IN A PENALTY PHASE?

A. IT DIDN'T TAKE LONG BECAUSE THEY TOLD ME THEY DIDN'T WANT TO GET ON THE STAND BECAUSE THEY COULDN'T SAY ANYTHING GOOD ABOUT JOEY KOON. THAT HE TREATED THEM LIKE CRAP THEIR WHOLE LIVES AND NOW HE EXPECTS THEM TO COME TO HIS RESCUE AT THE END AND THEY WEREN'T GOING TO DO IT.

Q. DID STACY KOON TELL YOU THAT?

A. WHICH ONE IS STACY?

Q. STACY KOON, DID YOU TALK TO STACY KOON AT ALL?

A. IS THAT THE NEPHEW?

Q. NO, STACY KOON IS A GIRL?

A. NO.

Q. SHE'S A MEMBER OF THE FAMILY. AS A MATTER OF FACT, SHE'S MARRIED TO ONE OF THE KOONS. UH – DID YOU TALK TO A MARJORIE FLEMING?

A. I DON'T RECALL TALKING TO A FLEMING?

Q. DID YOU TALK TO AN ELTON BERNARD?

A. IS THAT THE PREACHER?

Q. YES.

A. YES, HE STOOD RIGHT THERE, ABOUT THE THIRD ROW BACK AND TOLD ME RIGHT BEFORE THE PENALTY PHASE, AFTER TELLING ME THAT HE WOULD TESTIFY IN THE PENALTY PHASE, THAT HE'D CHANGED HIS MIND. THAT HE COULDN'T SAY ANYTHING GOOD ABOUT MR. KOON.

Q. IF HE SAYS THAT YOU NEVER CONTACTED HIM UNTIL THE NIGHT BEFORE THE PENALTY PHASE OF THE TRIAL AND THEN FOR ABOUT FOUR [30] MINUTES, WOULD THAT BE CORRECT?

A. I HAVE NO INDEPENDENT RECOLLECTION OF THAT. I KNOW I ASKED HIM IF HE WAS READY TO GET ON THE STAND, AFTER BELIEVING I HAD A WITNESS FOR THE PENALTY PHASE, AND HE SAID, NO, HE CHANGED HIS MIND.

Q. DID YOU EVER SEEK OUT ANY CO-EMPLOYEES OF WALTER KOON?

A. NO.

Q. YOU – DID YOU HAVE HIS EMPLOYMENT RECORD? DID YOU GET IT?

A. I HAD HIS EMPLOYMENT HISTORY.

Q. AND YOU DIDN'T SEEK OUT CO-EMPLOYEES?

A. NO.

Q. DID YOU EVER SEEK OUT FROM MRS. KOON ANYTHING TO DO WITH WALTER'S EARLY CHILDHOOD?

A. ARE YOU TALKING ABOUT HIS MOTHER?

Q. YES.

A. JUST WITH CONVERSATIONS WITH HER ABOUT HIS EARLY CHILDHOOD. BUT I DON'T KNOW WHAT YOU'D SEEK OUT.

Q. DID YOU ASK HER OR INQUIRE IF THERE WERE ANY UNUSUAL CIRCUMSTANCES SURROUNDING WALTER KOON'S LIFE?

A. ONLY THAT HE – SHE JUST SAID THAT HE WAS VERY, VERY INDEPENDENT, ABOVE AND BEYOND HIS OTHER BROTHERS, AND I BELIEVE HE LEFT HOME AROUND SIXTEEN OR SEVENTEEN, AND SHE REALLY HAD LOST

TOUCH WITH HIM. BUT SHE DIDN'T TELL ME ABOUT ANY UNUSUAL CIRCUMSTANCES IN HIS LIFE. ARE YOU TALKING ABOUT A MOLESTATION OR A – EXCEPT A BATON ROUGE DETOX STAY WAS WHAT SHE INFORMED ME ABOUT.

Q. WERE YOU AWARE AT ANY TIME BEFORE THE PENALTY PHASE OR HAD BEEN INFORMED BEFORE THE PENALTY PHASE THAT WALTER KOON WAS STILLBORN?

A. OH, I'VE NEVER HEARD THAT.

Q. YOU'VE NEVER HEARD IT?

A. NO.

[31] Q. ALL RIGHT, NOW YOU SAY THAT YOU WERE ALLOWED TO USE THE INVESTIGATOR FOR THE PUBLIC DEFENDER'S OFFICE, IS THAT CORRECT?

A. YES.

Q. DO YOU KNOW WHAT WORK HE DID IN INVESTIGATING THE LIFE OF WALTER KOON –

A. NONE THAT I KNOW OF.

Q. – FOR THE PURPOSE OF A PENALTY PHASE PRESENTATION?

A. NONE THAT I KNOW OF.

Q. DID YOU ASK HIM TO DO ANY?

A. NO.

Q. WERE YOU AWARE, PRIOR TO THE PENALTY PHASE, THAT THE STATE HAD MONEY AVAILABLE FOR THAT PURPOSE?

A. I BELIEVE THERE WAS SOME GENERAL TALK IN THE COURTHOUSE ABOUT TRYING TO GET MONEY FOR THE PENALTY PHASE. I BELIEVE I WAS PROBABLY MADE AWARE THAT I COULD REQUEST IT.

Q. DID YOU EVER TRY?

A. NO.

Q. SO, CAN WE GET FROM YOU AN ESTIMATE OF HOW MUCH TIME YOU SPENT ON THE PENALTY PHASE, THE PENALTY PHASE WITH THESE WITNESSES THAT WE'VE JUST MENTIONED AND PREPARE THEM TO TAKE THE STAND?

A. A FEW HOURS.

Q. WOULD THE FOUR MINUTES THAT MR. BERNARD CITES BE MORE LIKELY THE –

MR. NEVELS: I'M SORRY, JUDGE, I'M GOING TO OBJECT TO –

A. WELL, FIRST OF ALL, I'VE TOLD YOU I DON'T REMEMBER A FOUR-MINUTE CONVERSATION WITH THE PREACHER.

THE COURT: JUST A MINUTE, THERE'S BEEN AN OBJECTION.

MR. NEVELS: JUDGE, FOR PURPOSES OF THE RECORD, MR. DALTON HAS BEEN QUESTIONING MR. MONAHAN WITH A [32] NUMBER OF AFFIDAVITS THAT HAVE NOT BEEN INTRODUCED INTO THE RECORD. AT PRESENT, I HAVE NOT OBJECTED TO THESE AFFIDAVITS BECAUSE THEY HAVEN'T BEEN OFFERED AND INTRODUCED AND IT'S IMPROPER QUESTIONING –

THE COURT: WHY?

MR. NEVELS: – BECAUSE THEY ARE ALL HEARSAY, JUDGE. IT'S ALL HEARSAY, IT'S HEARSAY AND IT'S NOT ADMISSIBLE AND HE CAN ASK MR. MONAHAN WHAT HE DID OR WHAT HE DIDN'T DO.

THE COURT: CAN YOU CITE ME A RULE OF LAW THAT SAYS THAT HEARSAY IS INADMISSIBLE IN A POST-CONVICTION RELIEF PROCEEDING?

MR. NEVELS: JUDGE, HEARSAY IN A CIVIL PROCEEDING AND IN A CRIMINAL PROCEEDING – UNLESS THERE IS AN EXCEPTION TO THE HEARSAY RULE THAT –

THE COURT: WHERE HAS THERE BEEN ANY HEARSAY. ALL HE'S BEEN DOING IS ASKING HIM QUESTIONS FROM DOCUMENTS THAT HE HAS IN FRONT OF HIM?

MR. NEVELS: – JUDGE, HE'S ASKING HIM –

THE COURT: WHICH MAY OR MAY NOT BE TRUE. HE'S ASKING MR. MONAHAN IF THE FOUR MINUTES IS CORRECT. IT DOESN'T MEAN THAT IT WAS FOUR MINUTES. ALL HE'S DOING IS ASKING HIM A QUESTION.

MR. NEVELS: YOUR HONOR, I THINK THE RECORD WILL REFLECT THAT HE ASKED HIM IF SO-AND-SO SAID THAT IT WAS ONLY FOUR MINUTES –

THE COURT: WELL, HOW IS THAT HEARSAY EVIDENCE?

MR. NEVELS: – BECAUSE IT'S –

THE COURT: MONAHAN CAN SAY NO. ALL HE'S DOING IS QUESTIONING HIM RIGHT NOW. HE'S NOT TRYING TO ELICIT HEARSAY TESTIMONY FROM MR. MONAHAN.

MR. NEVELS: WELL, I'LL RESERVE MY OBJECTION TO [33] YOUR RULING.

THE COURT: ALL RIGHT.

MR. DALTON: THANK YOU, YOUR HONOR.

A. QUESTION?

BY MR. DALTON:

Q. WE'RE DISCUSSING THE FOUR MINUTES –

A. ON ELTON –

Q. – ON ELTON BERNARD?

A. – I'D HAVE TO DISPUTE THAT BECAUSE I BELIEVE MR. BERNARD CAME A FEW TIMES WITH MRS. KOON TO MY OFFICE AND SAT DOWN FOR SEVERAL HOURS AND TALKED ABOUT ALL ASPECTS OF THE CASE. SO, I WOULD CONCLUDE THAT, IF I'M SITTING THERE TALKING WITH SOMEBODY ABOUT THE CASE – UH – WE'RE TALKING ABOUT THEIR TESTIMONY AND WHAT THEY HAVE TO OFFER. BUT DID I EVER SAY MR. ELTON, YOU NEED TO COME TO MY OFFICE TO SPECIFICALLY SIT DOWN AND PREPARE YOU FOR THE PENALTY PHASE, I WOULD SAY, NO, I NEVER DID THAT.

Q. DID YOU DO THAT WITH ANY OF THE WITNESSES THAT YOU USED IN THE PENALTY PHASE?

A. WELL, IF I SAT THERE AND TALKED WITH THE BROTHER FOR A COUPLE OF HOURS ABOUT WHAT HE HAD TO OFFER, I GENERALLY CONSIDERED THAT HE WAS GOING TO TESTIFY, AND HE ASSUMED THAT HE WAS GOING TO HAVE TO TESTIFY IF IT CAME DOWN TO IT. BUT THEY ALL CHANGED THEIR MIND AT THE END. THE ONES I HAD LINED UP CHANGED THEIR MIND AT THE END.

Q. UH – AS THE FACTS TURNED OUT, YOU ONLY USED ONE WITNESS IN THE PENALTY PHASE?

A. THAT'S CORRECT.

Q. AND THAT WAS THE MOTHER?

A. THAT'S CORRECT.

Q. THAT WAS MRS. FLORENCE WILLIAMS.

A. YES, YOU CALLED HER MRS. KOON A MINUTE AGO.

Q. YOU HAD NEVER PREPARED HER TO TAKE THE STAND IN THE [34] PENALTY PHASE AND EXPLAINED TO HER THAT SHE WAS GOING TO BE CROSS-EXAMINED?

MR. NEVELS: OBJECTION, YOUR HONOR, HE'S ALREADY TESTIFIED THAT HE DID THAT.

THE COURT: SUSTAINED.

BY MR. DALTON:

Q. UH – THE RECORD WILL SHOW THAT MRS. KOON'S TESTIMONY CONSISTED OF TWO TYPE WRITTEN PAGES, DOUBLE SPACED. WOULD YOU DISPUTE THAT?

A. NO, I WOULD NOT.

Q. AND THAT WAS TO COVER FORTY-EIGHT YEARS LIFE OF HER SON. YOU WERE AWARE THAT HE WAS FORTY-EIGHT YEARS OLD WHEN HE WAS TRIED?

A. OF COURSE.

Q. AND YOU NEVER ASKED HER ABOUT UNUSUAL CIRCUMSTANCES, ILLNESSES, BIRTH, OR ANY INDICATION OF UNUSUAL CIRCUMSTANCES THAT SHE COULD DESCRIBE CONCERNING WALTER'S LIFE?

A. NO, I DID NOT ASK THAT QUESTION.

MR. DALTON: PARDON ME ONE MINUTE.

BY MR. DALTON:

Q. NOW PRIOR TO THE PENALTY PHASE DID YOU SEEK OUT HIS SCHOOL RECORDS?

A. NO.

Q. DID YOU SEEK OUT HIS MILITARY RECORDS?

A. HE HAD BROUGHT ME HIS HONORABLE DISCHARGE PAPERS BECAUSE I THINK I HAD THOSE.

Q. BUT YOU WERE AWARE THAT HE WAS IN THE MILITARY?

A. YES.

Q. AND YOU DID NOT SEEK OUT HIS – UH – MILITARY PERFORMANCE?

A. NO.

Q. DID YOU SEEK OUT HIS MEDICAL RECORDS FROM BIRTH UNTIL THE TIME OF TRIAL?

[35] A. NO.

Q. DID YOU SEEK OUT – LET ME ASK YOU THIS – WERE YOU AWARE THAT

A. WHEN YOU SAY SEEK OUT, DO YOU MEAN DID I TALK TO HIM ABOUT THAT INFORMATION OR DID I ACTUALLY WRITE THE AGENCY AND OBTAIN THE RECORDS?

Q. – DID YOU ATTEMPT TO GET 'EM?

A. NO.

Q. YOU WERE AWARE THAT AT THE TIME OF TRIAL, OR PRIOR TO TRIAL, THAT MR. KOON HAD AT LEAST AN ALCOHOL PROBLEM, WERE YOU NOT?

A. YES.

Q. AND SOMEWHAT OF A DRUG PROBLEM?

A. ZANAX AS I WAS TOLD.

Q. ALL RIGHT. UH – DID YOU SEEK OUT DURING HIS LIFETIME ANY DETOXICATION RECORDS THAT MIGHT EXIST?

A. I TRIED TO GET THEM FROM THE BATON ROUGE DETOX OVER ON FLORIDA BOULEVARD AND WAS UNSUCCESSFUL.

Q. DID YOU EVER ASK THE COURT TO ISSUE A SUBPOENA FOR ANY OF THOSE RECORDS?

A. NO, BUT I HAD MEDICAL AUTHORIZATIONS THAT I SENT OVER THERE FOR THEM AND THEY WOULDN'T –

Q. MR. MONAHAN, FIRST, I WANT TO THANK YOU FOR TAKING THIS CASE PRO BONO.

A. – I THANK YOU FOR TAKING IT ALSO.

Q. BUT – UH – YOU KNOW WHAT WE HAVE TO DO HERE?

A. IT'S NOT PERSONAL, MR. DALTON.

Q. ALL RIGHT, I WANT TO THANK YOU FOR YOUR TESTIMONY.

MR. DALTON: I TENDER THE WITNESS, YOUR HONOR.

(REPORTER'S NOTE: MR. MONAHAN GOT UP TO LEAVE THE WITNESS STAND.)

THE COURT: WAIT A MINUTE.

[36] MR. NEVELS: NOT SO FAST.

THE COURT: I DON'T BLAME YOU. I WOULDN'T WANT TO BE QUESTIONED BY THE STATE EITHER.

[37] CROSS-EXAMINATION:

BY MR. NEVELS:

Q. MR. MONAHAN, LET'S GO BACK TO THE TIME YOU WERE INITIALLY APPOINTED AS COUNSEL IN THIS CASE. THAT WAS BACK IN 1994, WASN'T IT?

A. IF THIS EVENT HAPPENED IN '93, I THINK IT WAS IN THE SPRING OF '94, APPROXIMATELY, A YEAR LATER THAT I WAS APPOINTED.

Q. AND THE TRIAL WAS THEN IN '95?

A. YES.

Q. OKAY, BY THE TIME OF YOUR APPOINTMENT CAN YOU TELL THE COURT YOUR CRIMINAL LAW EXPERIENCE? FOR INSTANCE, AND LET ME BE SPECIFIC, HAD YOU TRIED – HOW MANY FELONY, CRIMINAL CASES HAD YOU TRIED BY THIS TIME?

A. JURY TRIALS?

Q. RIGHT.

A. AT LEAST TWENTY TO TWENTY-FIVE JURY TRIALS.

Q. AND –

A. CRIMINAL.

Q. – HOW MANY JUDGE TRIALS?

A. COUNTING MISDEMEANORS?

Q. SURE.

A. HUNDREDS.

Q. HOW LONG HAD YOU BEEN PRACTICING LAW BY THE TIME OF YOUR APPOINTMENT?

A. OCTOBER 7TH, 1983.

Q. AND WHAT WAS YOUR –

A. IS WHEN I WAS SWORN IN.

Q. – OKAY, WHAT WAS THE PRIMARY FOCUS OF YOUR PRACTICE OR WHAT HAS BEEN THE PRIMARY FOCUS?

A. CRIMINAL LAW AND PERSONAL INJURY, A LITTLE BIT OF WORKMAN'S COMP, NOTHING ELSE.

Q. AT THE TIME OF YOUR APPOINTMENT, CAN YOU TELL US WHAT THE [38] PERCENTAGE OF YOUR CRIMINAL LAW/CIVIL LAW PRACTICE WAS?

A. I KNOW TIME SPENT, IT SEEMS – CRIMINAL LAW SEVENTY-FIVE PERCENT OF MY TIME IS CRIMINAL LAW AND TWENTY-FIVE PERCENT IS CIVIL. BUT AS FAR AS REVENUES, AT LEAST SIXTY TO SEVENTY PERCENT OF MY REVENUES IS FROM CIVIL AND NOT CRIMINAL.

Q. NOW, I KNOW MISS VINET MENTIONED IT WHEN SHE WAS ON THE STAND, PRIOR TO YOUR APPOINTMENT YOU HAD TRIED AT LEAST ONE OTHER CAPITAL MURDER CASE, HADN'T YOU?

A. YES, ***STATE OF LOUISIANA VERSUS MITLON HOLIDAY*** AND JUDGE LINDA HOLLIDAY WAS THE TRIAL JUDGE.

Q. CAN YOU TELL – THEY WEREN'T RELATED WERE THEY?

A. NO, THEY WERE NOT.

Q. CAN YOU TELL ME WHAT THE FACTS WERE IN THAT CASE, JUST BRIEFLY?

MR. DALTON: YOUR HONOR, I'M GOING TO OBJECT TO THAT QUESTION. IT SEEMS A LITTLE IRRELEVANT.

MR. NEVELS: JUDGE, THEY – IT'S COMPLETELY RELEVANT. IT GOES TO THE STRATEGY THAT MR. MONAHAN HAD WITH RESPECT –

THE COURT: OVERRULED.

A. MILTON HOLLIDAY HAD – UH – BEEN IN THE SIP AND BITE LOUNGE OVER ON NORTH BOULEVARD. SOMEBODY HAD KICKED HIS GIRLFRIEND. HE CHASED THE TWO BROTHERS OUT INTO THE PARKING LOT AND HE SHOT BOTH OF THEM. SO THE AGGRAVATING CIRCUMSTANCES WERE KILLING MORE THAN ONE

PERSON AND I FOUND THEM SIMILAR TO THIS PARTICULAR CASE, KILLING MORE THAN ONE PERSON.

BY MR. NEVELS:

Q. AND IN THAT CASE, SIR, YOU TRIED THAT CAPITAL CASE WITH THE ASSISTANCE OF ANY OTHER ATTORNEY?

A. NO, I TRIED IT BY MYSELF. I ARGUED MANSLAUGHTER TO THE JURY IN THE GUILT PHASE. THEY WERE OUT SEVEN HOURS AND CAME BACK GUILTY, FIRST DEGREE MURDER. WE CAME BACK AND DID THE PENALTY [39] PHASE AND THEY WERE OUT APPROXIMATELY FIFTEEN MINUTES AND GAVE LIFE, AND I HAD WORRIED ABOUT THE CREDIBILITY ISSUES OF GUILT TO THE PENALTY PHASE.

Q. AND HOW LONG BEFORE YOU WERE APPOINTED DID THE ***MILTON HOLLIDAY*** DECISION COME BACK, IF YOU CAN RECALL?

A. I THINK ***MILTON HOLLIDAY*** WAS IN 1991, AND SO THAT WOULD HAVE BEEN TWO YEARS. THE EVENT HAPPENED IN '91, AND IT WAS APPROXIMATELY TWO YEARS LATER THAT I WAS APPOINTED FOR THIS ONE.

Q. AT THE TIME – PRIOR TO THE TIME OF YOUR APPOINTMENT, WERE YOU AWARE OF THE STATUS OF MANY OF THE CAPITAL CASES HERE IN EAST BATON ROUGE PARISH?

A. THERE HAD BEEN A STRING OF DEATH PENALTIES GOING ON, I KNEW THAT.

Q. AND AS YOU SAID, YOU WERE APPROACHED BY CARL BABIN?

A. YES.

Q. AND IT WAS NOT – HAVE YOU BEEN APPOINTED, LET ME BACK UP, HAVE YOU BEEN APPOINTED TO WORK WITH OTHER CRIMINAL CASES BY BEING ON A PARTICULAR APPOINTMENTS BOARD OR SYSTEM?

A. NO, I GENERALLY DON'T SEEK OUT APPOINTMENTS. UH – SOMETIMES IN A COURTROOM IF SOMEBODY NEEDS SOME ASSISTANCE AT THE MICROPHONE, I'LL WALK UP THERE. I THINK I TOOK AN APPOINTMENT IN JUDGE KELLEY'S COURT LAST YEAR, BUT I'M GENERALLY NOT ON THE APPOINTMENT LIST.

Q. OKAY, WHY DO YOU FEEL THAT THE JUDGES APPOINT YOU IN THESE CASES?

A. I THINK BECAUSE I WAS SUCCESSFUL IN ***MILTON HOLLIDAY'S*** CASE THAT I WAS APPOINTED ON THIS CASE.

Q. AND SO WERE YOU TOLD THAT WAS ONE OF THE MAIN REASONS YOU WERE APPROACHED FOR WALTER KOON'S CASE?

A. I THINK CARL BABIN GOT MY NAME FROM JUDGE LINDA HOLLIDAY.

Q. AND YOU –

A. THERE HAD BEEN SOME DISCUSSION IN THE COURTHOUSE TO FIND [40] A LAWYER. NOBODY WANTED THE CASE. MR. BUCKLEY – UH – EITHER WASN'T DOING WHAT HE WAS SUPPOSED TO DO OR MR. KOON WAS NOT SATISFIED WITH MR. BUCKLEY.

Q. NOW, MR. BUCKLEY WAS A PUBLIC DEFENDER, RIGHT?

A. YES.

Q. AND I WOULD ASSUME THAT HIS CASE LOAD OF CRIMINAL CASES WAS MUCH MORE SUBSTANTIAL THAN YOURS?

A. I WOULD THINK SO.

Q. YOU CERTAINLY WOULDN'T TAKE ON A CAPITAL CASE IF YOU DIDN'T HAVE THE TIME TO DEVOTE TO IT, WOULD YOU?

A. NO, I THOUGHT THAT THESE FACTS WERE SIMILAR TO THE ***MILTON HOLLIDAY*** CASE IN THAT HE KILLED MORE THAN ONE PERSON AND IN THAT HE DID IT IN A RAGE AND I COULD ARGUE MANSLAUGHTER. AND IF I DIDN'T WIN IN THAT, AT LEAST IT WOULD BLEED OVER INTO THE PENALTY PHASE.

Q. IN THE ***MILTON HOLLIDAY*** CASE DID MILTON HOLLIDAY TAKE THE STAND?

A. YES, HE TOOK THE STAND IN THE GUILT PHASE.

Q. DID HE EXPRESS REMORSE DURING THAT TIME?

A. YES, I BELIEVE HE DID. HE SAID THE GUN BLIP, BLIP WENT OFF. HE DIDN'T MEAN TO SHOOT.

Q. SO YOU HAD, AND I – STRIKE THAT. WHEN YOU TRIED MILTON HOLLIDAY – THE ***MILTON HOLLIDAY*** CASE, YOU FOCUSED THEN ON THE GUILT PHASE OF TRIAL?

A. YES, I DID.

Q. AND THAT WAS A STRATEGIC DECISION YOU MADE?

A. YES, I DID, AND I HAD FOR THE PENALTY PHASE HIS MOTHER AND A PREACHER AND I THINK A LADY IN THE CUB SCOUTS TESTIFY.

Q. NOW, WHEN YOU WERE APPOINTED TO REPRESENT MR. KOON, WAS THERE EVER ANY DISCUSSION ABOUT LOUISIANA SUPREME COURT RULES ON APPOINTMENT OF COUNSEL IN CAPITAL CASES?

A. I HAD NONE WITH ANYBODY.

[41] Q. WERE YOU EVER ADVISED THAT YOU HAD TO HAVE TWO ATTORNEYS TO TRY A CAPITAL CASE?

A. I CAN'T SAY ANYBODY CAME UP AND SAID, KEVIN, I ADVISE YOU THAT YOU SHOULD BE DOING IT WITH TWO LAWYERS. NO, NO ONE EVER ADVISED ME OF THAT.

Q. YOU CERTAINLY WOULDN'T HAVE TAKEN THIS CASE ON IF YOU DIDN'T THINK THAT YOU COULD HANDLE IT YOURSELF, WOULD YOU?

A. NO, I WOULDN'T DO THAT.

Q. NOW, WHEN MISS VINET CAME ON BOARD, WHAT WAS, WHAT WAS THE WHOLE STORY BEHIND THAT?

A. SHE WAS GOING TO ASSIST ME IN THE TRIAL BUT I NEVER DIVIDED IT UP AND SAID YOU'RE GOING TO HAVE THE GUILT PHASE OR I'M GOING TO HAVE THE PENALTY PHASE, OR YOU'RE GOING TO HAVE THE PENALTY PHASE; I'M GOING TO HAVE THE GUILT PHASE. I WAS GOING TO DO IT ALL AND I WAS GOING TO GET HER TO ASSIST ME, AND SHE'S A SKILLED TRIAL ATTORNEY. SHE KNOWS HOW TO PICK A JURY. SHE TRIED A JURY TRIAL UP IN JUDGE WELCH'S COURT AND WAS SUCCESSFUL.

Q. NOW, WHEN YOU SAY ASSIST, YOU MEAN FOR INSTANCES IN JURY SELECTION?

A. YES.

Q. AND THAT WOULD HAVE BEEN IN HELPING YOU PICK OUT OR, OR HELPING YOU GET A READ ON PARTICULAR JURORS?

A. CORRECT.

Q. AND DO YOU RECALL HOW LONG THE JURY SELECTION WAS IN MR. KOON'S CASE?

A. I BELIEVE IT LASTED CLOSE TO A WEEK, I'M NOT SURE. I SAY A WEEK. I'D SAY ABOUT FIVE DAYS.

Q. NOW, DO YOU REMEMBER THE STATE'S ATTORNEYS IN THIS CASE?

A. OH YES, LOU DANIEL, BUT HE WASN'T, THE LEAD COUNSEL. MR. WALL WAS THE LEAD COUNSEL.

Q. AND, IN FACT, MR. WALL TRIED THE MAJORITY OF THIS CASE, DIDN'T HE?

[42] A. RIGHT, AND THE WHOLE THING IS, TO BE HONEST WITH YOU, WHEN YOU COME INTO COURT, IT'S USUALLY YOU AND THE DEFENDANT AND YOU'VE GOT, JUST LIKE YOU'VE GOT NOW, THREE OR FOUR LAWYERS SITTING OVER THERE. EVERYBODY GETS TO POW WOW. YOU HAVE THIS LITTLE TEAM AND THAT'S WHAT I WANTED TO HAVE. I WANTED TO HAVE MISS VINET WITH ME TO MAKE ME FEEL COMFORTABLE AND HAVE ANOTHER LAWYER ASSISTING ME IN THE CASE.

Q. BUT YOU KNEW ALL ALONG YOU WERE TRYING THE CASE?

A. OH, YES.

Q. AND IF IT DIDN'T – AND IF YOUR STRATEGY WASN'T SUCCESSFUL AT THE GUILT PHASE, YOU WERE READY TO TRY THE PENALTY PHASE?

A. I WAS READY TO TRY THE PENALTY PHASE AS I DID BEFORE AND I GOT UP AS I DID BEFORE AND I HOPED THAT THEY WOULD NOT HOLD IT AGAINST ME AND THAT THEY WOULD KEEP MY CREDIBILITY FROM THE GUILT PHASE TO THE PENALTY PHASE.

Q. NOW, MR. MONAHAN, YOU'VE READ THE ALLEGATIONS THAT MR. KOON HAS MADE AGAINST YOU HIS APPLICATION FOR POST-CONVICTION RELIEF, HAVEN'T YOU?

A. I'VE READ THE FIRST TWENTY-FIVE PAGES OF THAT DOCUMENT TO YOUR LEFT HAND.

Q. SO YOU UNDERSTAND THAT HE IS ALLEGING THAT YOU WERE OVER WORKED AND THEREFOR UNPREPARED FOR TRIAL. IN FACT, TO QUOTE HIM, MONAHAN WAS OVERWHELMED BY THE TASK OF PREPARING BOTH PHASES OF KOON'S TRIAL BECAUSE HE WAS WORKING ALONE. DO YOU AGREE WITH THAT STATEMENT?

A. NO, I DON'T THINK I WAS OVERWHELMED.

Q. AT THE TIME YOU WERE TRYING MR. KOON'S CASE, WERE YOU ABLE TO DEVOTE ALL OF YOUR ATTENTION TO IT OR WAS THERE ANYTHING FROM PREVENTING YOU FROM, FROM DEVOTING ALL OF YOUR –

A. NO, THE STATEMENT IS TRUE THAT WHEN THE LAWYER IS IN A DEATH PENALTY TRIAL MOST OF THE STUFF AT HIS OFFICE IS PUT ON HOLD AND THAT'S WHAT HAPPENED. I PUT THINGS ON HOLD AND I [43] CONCENTRATED AND I FOCUSED AND I GAVE MR. KOON AS MUCH AS I COULD GIVE HIM THAT I HAD IN ME TO DO THIS CASE, AND I THINK EVERYBODY KNOWS THAT.

Q. BUT THEY'RE MAKING THIS ALLEGATION THAT BECAUSE OF THE LIMITED AMOUNT OF HOURS YOU PUT ON THE PENALTY PHASE THAT SOMEHOW YOU WERE BEATEN DOWN AT THE CLOSE OF THE GUILT PHASE. IS THAT ACCURATE?

A. NO, THAT'S NOT ACCURATE.

Q. AND, IN FACT, THEY'RE CLAIMING THAT YOU HAD NOTHING LEFT TO GIVE AFTER THE GUILT PHASE. IS THAT ACCURATE?

A. I WOULDN'T SAY NOTHING LEFT TO GIVE. ANY LAWYER TRIES AND TRIES AS HARD

AS THEY CAN IN THE GUILT PHASE IS GOING TO BE TIRED IN THE NEXT PHASE.

Q. BUT DID YOU EVER AT ANYTIME DURING THIS TRIAL OR EVEN BEFORE, FELL THAT YOU WERE UNABLE TO ADEQUATELY AND COMPETENTLY REPRESENT MR. KOON?

A. NO, I WOULD HAVE ASKED FOR SOME HELP.

Q. OKAY, LET'S TALK A LITTLE BIT ABOUT YOUR – UH – YOUR THEORIES AND STRATEGIES. FIRST OF ALL, WHEN YOU INITIALLY MET MR. KOON DID HE ADMIT TO THESE KILLINGS?

A. YES.

Q. AND –

A. HE DENIED THEY WERE INTENTIONAL THOUGH AND HE DENIED THE PHONE CALL TO HIS MOTHER.

Q. – DID HE EVER EXPRESS ANY REMORSE FOR THESE KILLINGS TO YOU?

A. YES, I THOUGHT HE'D MAKE A GOOD WITNESS. I THOUGHT HE WAS REALLY SORRY FOR WHAT HAPPENED AND I THOUGHT HE WOULD MAKE A GOOD WITNESS AND THE JURY WOULD SEE THAT AND SAY THAT THIS WAS JUST A BIG OLE' DOMESTIC DISPUTE THAT JUST WENT A LITTLE TOO FAR.

Q. WELL, MR. KOON ALLEGES THAT YOU COERCED HIM INTO TAKING THE STAND AT TRIAL, IS THAT TRUE?

[44] A. I COULD NOT HAVE STOPPED MR. KOON FROM GETTING ON THAT STAND. HE WANTED THAT TRIAL AND HE WANTED TO GET ON THAT STAND AND HE WANTED TO TELL HIS STORY. IN RETROSPECT, IF I COULD DO ANYTHING DIFFERENT, I WOULD NOT HAVE PUT MR. KOON ON THE STAND.

Q. AND WHY WAS THAT, MR. MONAHAN?

A. BECAUSE HE CAME ACROSS AS A COLD-HEARTED KILLER.

Q. AND DO YOU THINK THAT THAT HAD ANYTHING TO DO WITH HIS FAMILY – UH – ABANDONING HIM AT THE PENALTY PHASE?

A. I CAN'T SAY WHY HIS FAMILY ABANDONED HIM AT THE PENALTY PHASE BUT I DO KNOW THIS, MR. KOON WAS LIKE A DIFFERENT PERSON ON THE STAND. I WAS LIKE I HAD NEVER EVEN MET THAT PERSON THAT GOT UP ON THE STAND. WHEN HE CALLED MR. GUIDRY A BULLY AND THE WHOLE COURTROOM ERUPTED IN LAUGHTER AND I LOOKED AT THE JURY AND THE JURY WAS LAUGHING, I JUST COULDN'T BELIEVE IT. I FELT THAT AT THAT POINT IT WAS – IT WASN'T COMING BACK.

Q. WAS THERE ANY WAY IN YOUR MIND THAT YOU COULD HAVE KNOWN THAT HE WAS GOING TO MAKE SUCH A TERRIBLE WITNESS?

A. NO, BECAUSE HE SEEMED SO GOOD WHEN I WOULD TALK TO HIM IN THE INTERVIEWS. HE SEEMED DOWNHEARTED AND CARING AND HE WOULD TELL THE STORY ABOUT SELLING THE EL CAMINO AND, I JUST WANTED TO GO OVER THERE AND GIVE MICHELLE HER HALF OF THE PROCEEDS. IT WAS HALF HER CAR. I WAS JUST GOING OVER THERE TO GIVE THE MONEY. I THOUGHT IT WAS GOING TO MAKE A GOOD DEFENSE.

Q. AND SO BASED ON HOW HE HAD ACTED TO YOU – UH – SPOKEN WITH YOU IN THE PAST, COULD YOU HAVE ANY RESERVATIONS OF PUTTING HIM ON THE STAND?

A. I HAD NO RESERVATIONS ABOUT PUTTING HIM ON THE STAND AND HE HAD NO RESERVATIONS ABOUT GETTING UP ON THE STAND. AND ANYTIME I BROACHED THE SUBJECT ABOUT, DO YOU WANT TO GET UP THERE, IT WAS, OH, YEAH, I'M READY TO TELL MY STORY. I'M READY TO TELL 'EM WHAT HAPPENED.

Q. AND WAS IT YOUR OPINION THAT IF – EVEN IF THE JURY WOULD [45] HAVE COME BACK WITH A FIRST DEGREE GUILTY VERDICT, IF MR. KOON HAD BEEN A GOOD WITNESS ON THE STAND THAT THAT EVIDENCE COULD

HAVE BEEN USED AT THE PENALTY PHASE AS MITIGATING EVIDENCE?

A. I DIDN'T UNDERSTAND THAT?

Q. IF MR. KOON – UH – HYPOTHETICALLY – UH – IF MR. KOON WOULD HAVE GOTTEN ON THE STAND AND HAVE EXPRESSED REMORSE, TO COME OFF AS A GOOD WITNESS WHO WAS VERY CONCERNED AND WHO WAS OBVIOUSLY AFFECTED BY ALL OF THE THINGS HE HAD TOLD YOU BEFOREHAND, WAS HE NOT?

A. IN THE GUILT PHASE?

Q. RIGHT.

A. RIGHT.

Q. WOULD YOU HAVE THEN TURNED RIGHT AROUND AND USED THAT IN THE PENALTY PHASE IF YOU WERE SUCCESSFUL IN –

A. I WOULD HAVE PUT HIM BACK UP THERE, BUT I TELL YOU, MR. KOON WAS THE WORST WITNESS I HAVE EVER SEEN ON THE STAND. I MEAN, I'M TELLING YOU THAT AND IT WAS BAD. IT WAS BAD. I CAN'T TELL –

Q. SO THAT'S WHY HE DIDN'T TAKE THE STAND IN THE PENALTY PHASE?

A. – AND I DENY COERCING HIM TO GET UP ON THE STAND.

Q. YOU INVESTIGATED, THROUGH TALKING WITH HIM, HIS PROBLEMS WITH ALCOHOL AND WITH PILLS, RIGHT?

A. YES, HE SAID HE HAD – UH – HE'D QUIT ALCOHOL AND GOT BACK WITH MICHELLE, BUT SHE STARTED TO BELITTLE HIM AND MAKE FUN OF HIM AND THAT HE WOULD GO BY THE PARENT'S HOUSE AND HE WOULD NOT – HE'D NOT FIT IN. SO IT WAS LIKE SHE HAD STARTED HIM DRINKING AGAIN. SO I WAS AWARE OF THE ALCOHOL AND I WAS AWARE OF THE ZANAX.

Q. DID YOU FEEL THAT ANY ADDITIONAL INVESTIGATION IN THAT WOULD, WOULD HELP OR HURT YOUR CASE?

A. WELL, THE INVESTIGATION, I HIRED A PHARMACOLOGIST TO COME [46] IN AND TALK ABOUT WHEN YOU'RE NOT ON ZANAX AND YOU'RE STRUNG OUT ON ZANAX AND THE DAY YOU'RE NOT ON ZANAX YOU GO INTO A REBOUND, HYPEREXCITABILITY. I THOUGHT THAT WAS GOING TO ADD TO HIS LACK OF INTENT AND HIS RAGE. SO I WAS INVESTIGATING THE DRUG ASPECT OF IT. I ACTUALLY THROUGH MY OWN AMERICAN EXPRESS CARD, I HAD A NEPHEW FLOWN IN FROM ATLANTA TO GET UP AND TALK ABOUT THE – UH – THE ZANAX USE THE NIGHT BEFORE. YES, SO AS FAR AS INVESTIGATING THE DRUG ASPECT OF IT, YES, I WAS TRACKING THAT DOWN. I WAS

TRYING TO PRESENT THE CASE THAT HE WAS STRUNG OUT ON DRUGS AND I READ AN AFFIDAVIT FROM SARAH ROBINSON ABOUT – UH – SAYING THAT HE WAS DOING LINES OF COCAINE IN THE TRUCK AND THAT'S THE FIRST THAT I'VE HEARD ABOUT THE COCAINE; AND SECONDLY, THAT HE ATE A HANDFUL OF ZANAXS BEFORE HE WENT AND DID THIS KILLING. THE WHOLE THING WAS HE TOLD ME HE HAD NOT HAD ANY ZANAX THAT DAY AND THAT'S WHY HE WAS IN THE REBOUND, HYPEREXCITABILITY. SO, I DISPUTE SARAH ROBINSON'S AFFIDAVIT. THAT'S THE FIRST I'VE KNOWN ABOUT DOING COCAINE EXCEPT WHEN HE WENT INTO DETOX AND ABOUT HIM ACTUALLY INGESTING ZANAX PRIOR TO THE SHOOTING. IT WAS ALWAYS HE HADN'T HAD ANY THAT DAY AND THAT'S WHAT CAUSED HIM TO GO OFF.

Q. NOW LET'S TALK ABOUT – AND I THINK WE ALREADY HAVE FOR THE MOST PART – YOUR STRATEGY THEN IN WALTER KOON'S CASE WAS SIMILAR TO THAT OF YOUR STRATEGY IN ***MILTON HOLLIDAY'S*** CASE, WAS IT NOT?

A. TO PUT UP A FIGHT IN THE GUILT PHASE AND NOT GIVE THEM THE GUILT PHASE.

Q. AND THAT, OF COURSE, IN A SIMILAR MULTIPLE MURDER CASE HERE IN EAST BATON ROUGE PARISH?

A. AND TELL ME THIS, YOU'RE AWARE THAT IN CERTAIN DEATH PENALTY CASES THE ATTORNEYS GO, AND THROUGHOUT VOIR DIRE AND THROUGHOUT THE GUILT PHASE OF TRIAL, THEY ADMIT GUILT?

A. YES, I'M AWARE OF THAT STRATEGY.

Q. AND – .

A. IT'S A VERY PREVALENT STRATEGY.

[47] Q. – ARE YOU AWARE THAT IN THE MAJORITY, IF NOT ALL OF THE DEATH PENALTY CASES TRIED HERE IN EAST BATON ROUGE PARISH, THAT WHERE THAT STRATEGY IS FOLLOWED, A DEATH PENALTY HAS FOLLOWED?

A. I'M VERY AWARE OF THAT AND I WOULD TALK TO EVERYBODY WHO WANTED TO LISTEN TO ME ABOUT WHY ARE THEY BENDING OVER IN THE GUILT PHASE. WHY DOESN'T SOMEBODY PUT UP A FIGHT IN THE GUILT PHASE?

Q. ARE YOU SIMILARLY AWARE OF DEATH PENALTY CASES HERE IN EAST BATON ROUGE – UH – OR WERE YOU AWARE AT THE TIME OF MR. KOON'S TRIAL THAT IN CASES WHERE A HOST OF MITIGATING – UH – EVIDENCE OR EVIDENCE OF A PERSON'S CHILDHOOD WAS

PRESENTED TO A JURY THAT THOSE CASES ALSO RESULTED IN THE DEATH PENALTY?

A. THEY WERE NOT BEING SUCCESSFUL.

Q. SO, YOU KNOW ABOUT – YOU KNEW THAT THERE WERE DIFFERENT ROADS THAT YOU COULD TAKE IN DEFENDING MR. KOON?

A. YES.

Q. AND YOU DECIDED THAT, BASED UPON THE EVIDENCE, THAT THE STATE HAD PROVIDED YOU IN DISCOVERY AND THE TESTIMONY YOU HAD FROM YOUR INTERVIEWS WITH MR. KOON, THAT THAT WAS YOUR STRATEGY THEN, IT WOULD BE TO PURSUE A MANSLAUGHTER VERDICT?

A. YES.

Q. AND YOU FELT THAT YOU COULD BE SUCCESSFUL IN DOING THAT?

A. YES, I WAS THROWING DOWN THE GAUNTLET IN THE GUILT PHASE.

Q. NOW –

A. I BELIEVE THERE IS INFORMATION OUT THERE NOW THAT SHOWS INTENT, THAT I'VE HEARD ABOUT AND I'M NOT ANSWERING ANY QUESTION, BUT –

Q. WELL, LET ASK YOU ABOUT THAT. MR. DALTON GOT UP AND YOU'RE, YOU'RE AWARE

OF WHAT THE CORONER'S REPORT HAD TO SAY ABOUT THESE KILLINGS, WEREN'T YOU?

A. YES, I'VE READ THE CORONER'S REPORT.

Q. AND, IN FACT, YOU FILED –

[48] A. AND SEEN THE PHOTOGRAPHS.

Q. – YOU FILED ABOUT TWO DOZEN MOTIONS IN THIS CASE, DIDN'T YOU?

A. YES, I DID.

Q. AND YOU HAD THE POLICE REPORTS THAT INDICATED WHAT WAS GOING ON IN THIS CASE, DIDN'T YOU?

A. YES, I'D BEEN OUT TO THE TRAILER PARK AND INTERVIEWED THE – UH – WENT AND MET HIS MOTHER AT THE TRAILER PARK. I WENT TO THE VARIOUS TRAILERS IN THIS WHOLE – I RECREATED THE WHOLE EVENTS FOR THE LAST FEW DAYS, SECURED THE RECORDS ON THE DIVORCE. I WAS SHOWING THAT THIS DIVORCE WAS LIKE SETTING HIM OVER THE EDGE, BUT I THINK THERE IS INFORMATION ABOUT WITH SARAH ROBINSON AS TO, YOU HEAR ON THE BACK OF THE TAPE SHE'S SAYING HE'S GONE TO DEALER WRECKER. AND I THINK HER BOYFRIEND WORKED AT DEALER WRECKER AND I THINK IT HAS COME OUT LATER THAT THEY ACTUALLY HAD A PLAN TO GO OVER THERE AND DO THE

KILLING AND THEN GO TO DEALER'S WRECKER AND KILL THE BOYFRIEND, AND THEN GO OUT OF TOWN. SO, YOU KNOW, I DIDN'T HAVE THAT INFORMATION AT THE TIME. THIS IS WHAT I LEARNED LATER.

Q. SO, IN LIGHT OF THE INFORMATION THAT YOU HAD AT THAT TIME, YOU THOUGHT YOUR STRATEGY OF PURSUING THE GUILT PHASE AND THE MANSLAUGHTER WOULD BE MORE SUCCESSFUL THAT ADOPTING A – UH – ADMISSION OF GUILT AND THEN TRYING TO PUT ON SOME TYPE OF MITIGATING EVIDENCE?

A. CORRECT.

Q. ALL RIGHT, AND HAD YOU TRIED OTHER CRIMINAL CASES IN JUDGE ERWIN'S COURT PRIOR TO THIS TIME?

A. CRIMINAL DWI'S, MISDEMEANORS – I THINK THAT THAT WAS THE FIRST JURY TRIAL THAT I DID IN THIS PARTICULAR COURTROOM. I KNOW I DID ***STATE VERSUS TROY AND CEDRIC KNIGHT*** IN OCTOBER OF '94. NO, I DID ***STATE VERSUS TROY AND CEDRIC KNIGHT*** THAT WAS IN OCTOBER OF '94, THAT PRECEDED THE KOON TRIAL. SO KOON WOULD HAVE BEEN MY [49] SECOND JURY TRIAL IN THIS COURTROOM.

Q. DID YOU FEEL LIKE BEING APPOINTED BY JUDGE ERWIN ON THE RECOMMENDATION

OF CARL BABIN THAT – UH – YOU WOULD BE FAVORABLY – WELL NOT FAVORABLY, BUT FAIRLY TREATED THROUGHOUT THE COURSE OF THE PROCEEDINGS?

A. I THINK JUDGE ERWIN WOULD TREAT ME FAIRLY WHETHER I WAS PAID BY A MAFIA HITMAN OR BY SOMEBODY WHO WAS STEALING M AND M'S AT THE 7 – 11.

Q. AND YOU FOUND THAT TO BE THE CASE AT TRIAL?

A. YES, I WAS TREATED VERY FAIR.

Q. NOW, THERE'S BEEN SOME SUGGESTION THAT YOU DIDN'T – UH – MEET WITH ENOUGH MEMBERS OF MR. KOON'S FAMILY TO GET THEM TO TESTIFY. YOU DID TALK WITH, YOU SAID, HIS MOTHER, HIS BROTHER, AND A MINISTER ABOUT TESTIFYING AT THE PENALTY PHASE?

A. YES.

Q. AND WHEN HE WAS CONVICTED OF FIRST DEGREE MURDER AND IT PROGRESSED TO THE PENALTY PHASE, TWO OF THOSE WITNESSES TOLD YOU THEY DIDN'T WANT TO TESTIFY?

A. BOTH BROTHERS AND THE PREACHER DECLINED TO GET ON THE STAND.

Q. AND –

A. AS A TRIAL LAWYER, YOU THINK YOU'VE GOT THESE WITNESSES GOING INTO THE PENALTY PHASE AND IT DOESN'T DO MUCH FOR YOUR CONFIDENCE WHEN THE WITNESSES START TELLING YOU, I CAN'T OFFER ANYTHING GOOD ABOUT THIS MAN.

Q. AND SO –

A. AFTER THEY ARE TELLING ME THEY ARE GOING TO GET ON THE STAND.

Q. AND SO, OBVIOUSLY, YOU WOULDN'T WANT TO CALL WITNESSES THAT WOULD BE HOSTILE TO YOUR CLIENT?

A. NO, NO, I'M – THE RUG IS BEING PULLED OUT FROM UNDER ME.

Q. AND ALTHOUGH IT'S BEEN SUGGESTED THAT YOU DIDN'T SEEK OUT [50] ALL OF HIS RELATIVES OR CO-WORKERS OR WHATEVER, DID YOUR PHONE EVER RING WITH PEOPLE CALLING TO OFFER MITIGATING EVIDENCE ABOUT MR. KOON?

A. NOT AT ALL AND WHEN YOU SAY, DID YOU MEET WITH – HIS MOTHER PROBABLY HAD THREE OR FOUR APPOINTMENTS THAT SHE CAME BY MY OFFICE AND SAT DOWN THERE FOR AT LEAST AN HOUR-AND-A-HALF TO TWO HOURS, AND I WOULD TALK ABOUT THE CASE AND TALK ABOUT WHAT JOEY HAD TO SAY. SO IT IN MY MIND I'M PREPARING. I'M GETTING INFORMATION FROM THEM. I'M

READING THEM – HOW THEY'RE GOING TO DO ON THE STAND. BUT AT THE – UH – BUT AT THE END, ALL BUT MISS – HIS MOTHER CHOSE NOT TO GET ON THE STAND, SPECIFICALLY TELLING ME, THERE'S NOTHING GOOD I CAN SAY ABOUT HIM.

Q. AND YOU TESTIFIED THAT ALTHOUGH YOU MIGHT HAVE KNOWN THERE WAS MONEY AVAILABLE FOR INVESTIGATORS, THE REASON YOU DIDN'T HIRE THOSE OR USE THOSE INVESTIGATORS WAS WHAT?

A. I HAVE MY OWN INVESTIGATOR AND I HAVE A PARALEGAL AND I HAVE A SECRETARY AND I WAS DOING WHAT I COULD DO WITH MY OFFICE.

Q. AND SO IT WOULD BE WRONG TO SUGGEST THEN THAT BECAUSE YOU DIDN'T USE THE PUBLIC DEFENDER INVESTIGATOR THAT YOU DIDN'T INVESTIGATE THE CASE?

A. NO, I WAS WALKING AND TALKING JOEY KOON'S CASE. WHEN I GET READY FOR TRIAL, I MEAN, I'M LIVING AND DYING THAT CASE AND THAT'S WHAT I DID FOR HIM THAT DAY.

Q. HOW MUCH DO YOU THINK THAT IT COST YOU TO REPRESENT MR. KOON, BECAUSE YOU SAID YOU DID IT PRO BONO?

A. I KNOW. IT KINDA BOTHERS ME SOMETIMES WHEN THE LAWYERS GET ON T.V. AND

THEY START TALKING ABOUT ALL OF THE MONEY THAT THEY LOST.

THE COURT: I DON'T SEE ANY RELEVANCE TO THIS.

MR. DALTON: I DON'T THINK THERE'S ANY COST INVOLVED HERE.

MR. NEVELS: I'LL WITHDRAW THE QUESTION, JUDGE.

[51] A. THAT'S MY OWN PERSONAL MATTER, WHAT I DID FOR THE STATE.

BY MR. NEVELS:

Q. WELL, LET ME SAY THIS – UH – OR ASK YOU THIS, MR. MONAHAN, HOW MUCH TIME DO YOU THINK PUT INTO THE CASE?

A. HUNDREDS OF HOURS.

Q. LET ME FURTHER TRY TO BREAK THAT DOWN. THE PRE-TRIAL, AND THROUGHOUT THE COURSE OF THE YEAR THAT YOU WERE APPOINTED, UP UNTIL THE TIME OF TRIAL, HOW MUCH TIME DO YOU THINK YOU SPENT ON THE CASE?

A. I DON'T HAVE A QUANTIFIER. IT WAS A LOT OF TIME.

Q. AND WHEN YOU SAY HUNDRED OF HOURS, IS THAT –

A. THAT'S INCLUDING THE TRIAL.

Q. – BUT THAT'S JUST YOUR TIME. THAT'S NOT THE TIME SPENT BY YOUR PARALEGALS, YOUR SECRETARIES, AND YOUR OTHER PERSONS IN YOUR OFFICE?

A. THAT'S CORRECT.

Q. AND THEY COULD HAVE CONCEIVABLE SPENT HUNDREDS OF HOURS TOO, RIGHT?

A. YES.

Q. DID YOU KNOW ANYTHING ABOUT MR. KOON'S POETRY WRITING?

A. I HAD THE LETTER AND WHEN I READ THE LETTER THE FIRST TIME, I WAS MOVED BY IT. AND AFTER HE TESTIFIED, I FELT IT WOULD NOT WORK WITH THE JURY AND I CHOSE NOT TO PUT THAT LETTER IN THROUGH HIS MOTHER.

Q. SO EVEN IF YOU HAD A POEM WRITTEN BY MR. KOON, GIVEN HIS TESTIMONY DURING THE GUILT PHASE, WOULD –

A. IT WAS NOT GOING TO WORK. I CHOSE NOT TO PUT THAT LETTER IN. I DON'T KNOW ABOUT HIS POETRY WRITING SKILLS, BUT I KNOW THAT THE LETTER WAS VERY MOVING, BUT I CHOSE NOT TO PUT IT IN. I FELT THAT HE HAD LOST ALL OF HIS CREDIBILITY AND THAT WAS JUST GOING TO BE SOMETHING LIKE YOU WERE TRYING TO DUPE THE JURY WITH.

Q. ONE, ONE LAST GROUP OF QUESTIONS. IT'S SOMETHING THAT WAS [52] BROUGHT UP. YOU TALKED ABOUT THIS ISSUE ABOUT WHETHER JUDGE ERWIN SAID HE COULDN'T GET THE DEATH PENALTY DURING – AT THE CONCLUSION OF A MOTION TO SUPPRESS HEARING. WHY DID YOU THINK HE HAD A SYMPATHETIC CASE AT THAT TIME?

A. BECAUSE OF THE WAY I ASKED THE QUESTIONS AND THE WAY I WAS KINDA WORKING MY THEORY OF THE CASE WITH THE POLICE OFFICER WHO WAS TESTIFYING. IT KINDA LOOKED LIKE HE JUST EXPLODED AND THIS WAS REALLY JUST A DOMESTIC. MANY, MANY PEOPLE SAID IF HE JUST WOULD HAVE STOPPED IN THE BACK YARD, IT WOULD HAVE BEEN A MANSLAUGHTER.

Q. INSTEAD OF KILLING HIS IN-LAWS?

A. INSTEAD OF GOING IN THE HOUSE. WHAT MADE IT WORSE, THE POLICE OFFICER WHO CAME ON THE SCENE DID NOT GO IN THE HOUSE UNTIL ABOUT AN HOUR LATER, UNTIL AFTER HE HAD ALREADY ROPED OFF THE YARD, AND THAT WAS POWERFUL TESTIMONY WHEN HE STARTED ON THE STAND IN FRONT OF THE JURY OVER THAT. THAT MAYBE THERE WAS SOMETHING MORE THAT HE COULD HAVE DONE TO HELP MRS. GUIDRY.

Q. SO, JUST TO FINISH UP. YOU WERE AWARE THAT THERE WERE SOME HIGH STAKES INVOLVED IN THIS CASE?

A. DEFINITELY.

Q. AND TO YOUR KNOWLEDGE HAS THERE BEEN ANY OTHER TRIPLE MURDER IN THE EAST – IN EAST BATON ROUGE PARISH?

A. I THINK THE – UH – A CAR GOT SHOT UP WITH –

Q. AT THIS TIME?

A. – OH, AT THAT TIME, THAT WAS IT, BUT THERE HAS, SUBSEQUENTLY, BEEN A LOT OF STUFF, UNFORTUNATELY.

Q. AND IS IT YOUR, IS IT YOUR OPINION OR TELL ME YOUR OPINION, OF HOW MUCH TIME YOU SPENT – I KNOW – NOT HOW MUCH TIME YOU SPENT, BUT WHAT – UH –

A. IT'S NOT ABOUT ME SITTING AT MY DESK – LET ME WORK ON THIS FILE AND PUT DOWN 1.0 SO I CAN SEND MY BILL INTO THE STATE OF LOUISIANA. IT'S ABOUT SITTING THERE IN FRONT OF THE T.V.; IT'S [53] ABOUT BEING WITH FRIENDS; IT'S ABOUT IN THE SHOWER; IT'S ABOUT IN THE MORNING; IT'S ABOUT THINKING ABOUT A CASE ALMOST TWENTY-FOUR HOURS A DAY THAT YOU'RE AWAKE AND YOU CAN'T QUANTIFY THAT TIME. AND THAT'S WHAT I DID FOR MR. KOON.

Q. AND HOW DOES IT MAKE YOU FEEL NOW THAT HE CLAIMS THAT YOU'RE INCOMPETENT?

A. IT DOESN'T DO ANYTHING TO ME. I EXPECT IT.

THE COURT: THAT'S NOT AT –

MR. DALTON: NO CLAIM OF INCOMPETENCE IS MADE HERE, YOUR HONOR.

A. IT'S INEFFECTIVE AND I EXPECT HIM TO MAKE THAT CLAIM AND I EXPECT MR. DALTON TO MAKE THE CLAIM AND I DON'T HOLD THEM IN ANY DIFFERENT LIGHT TODAY THAN I DID TWO YEARS AGO. THIS MAN OVER HERE IS DOING HIS JOB JUST LIKE I DID THE BEST JOB THAT I COULD. AND I DON'T REALLY – I DON'T FAULT ANYBODY FOR WHAT THEY'RE DOING HERE TODAY. THEY'VE GOT A JOB TO DO JUST LIKE I HAD A JOB TO DO AND I DID MY JOB THE BEST THAT I COULD. IF SOMEBODY COMES ALONG LATER AND SAYS, I COULD HAVE DONE IT BETTER, THEN THEY CAN REVIEW THAT AND TELL ME THAT. BUT AT THE TIME, I WAS NOT SERVING UP JOEY KOON AS THE SACRIFICIAL LAMB. I WAS IN THERE TRYING. MY REPUTATION WAS ON THE LINE. I WAS TRYING THAT CASE AS HARD AS I COULD TRY THAT CASE. MR. KOON KNOWS THAT, WHAT I WAS GOING THROUGH AND WHAT HE WAS GOING THROUGH AT THE TIME THAT CASE

WAS BEING TRIED. BUT IT IS EASY TO COME BACK LATER AND SAY, WELL, HOW WOULD YOU ARGUE NO INTENT, HOW WOULD YOU – WHY DID YOU DO THIS. WHY DIDN'T YOU DO THAT, THAT'S FINE. I'M JUST SAYING WHAT I DID AT THAT TIME, I'M COMFORTABLE WITH AS I SIT HERE BEFORE YOU.

BY MR. NEVELS:

Q. MR. MONAHAN, YOUR REPUTATION CERTAINLY HASN'T SUFFERED IN THE LEGAL COMMUNITY FROM THE VERDICT THAT WAS RENDERED IN THIS CASE.

[54] A. I'M NOT WORRIED ABOUT THAT.

Q. AND YOU'VE TRIED OTHER CASES SUBSEQUENT TO THAT?

A. TRYING OTHER CASES ALL THE TIME.

Q. THAT'S ALL I HAVE. THANK YOU, SIR.

[55] REDIRECT EXAMINATION:

BY MR. DALTON:

Q. MR. MONAHAN, DO YOU KNOW REBECCA HUDSMITH?

A. YES, I DO.

Q. AND DO YOU KNOW DAVID BALL?

A. THEY INTERVIEWED ME AT MY OFFICE AND I REMEMBER SITTING THERE TALKING TO THEM ABOUT THE PENALTY PHASE.

Q. AND DURING THAT DISCUSSION, DID YOU MAKE A STATEMENT TO THEM THAT THE – NOT INTRODUCING THE LETTER YOU MENTIONED IN YOUR TESTIMONY HERE WAS AN OVERSIGHT, NOT A STRATEGIC DECISION?

A. I MAY HAVE TOLD THEM THAT THAT WAS AN OVERSIGHT, BUT I KNEW AT THE TIME, I HAD – MY INVESTIGATOR JUST LEFT AND I HAD A DISCUSSION WITH HIM ABOUT THAT LETTER. AND WE BOTH DECIDED THE JURY WASN'T GOING TO BUY THAT.

Q. AND DID YOU MAKE THE STATEMENT TO THEM – TO THE BOTH OF THEM IN THE PRESENCE OF EACH OTHER – THAT AFTER THE JURY RETURNED A VERDICT OF GUILTY ON ALL THREE COUNTS OF FIRST DEGREE MURDER, I LOST MY STEAM? I HAD NOT ADEQUATELY INVESTIGATED OR PREPARED FOR THE PENALTY PHASE?

A. I WOULD SAY I LOST MY STEAM AND LOOKING BACK NOW, I THINK THERE'S LOT MORE THAT I COULD HAVE DONE IN THE PENALTY PHASE, BUT THAT WASN'T MY FOCUS AT THE TIME.

Q. NOW, MR. MONAHAN –

A. I REMEMBER SITTING IN THAT CHAIR DURING THE PENALTY PHASE, AND YES, I WAS TIRED. AND WHEN THE VICTIM IMPACT STARTS ROLLING DOWN ON YOU AND YOUR WITNESSES ARE TELLING YOU THAT THEY'RE NOT GOING TO GET UP AND DO WHAT THEY SAID THEY WERE GOING TO DO FOR YOU, IT WAS OVERWHELMING. IT JUST STEAMROLLED.

Q. IS THAT, IS THAT WHEN YOU REALIZED THAT TWO ATTORNEYS ARE BEST?

MR. NEVELS: I'M SORRY, BUT I'M GOING TO OBJECT. I DON'T THINK MR. MONAHAN HAS EVER TESTIFIED THAT TWO [56] ATTORNEYS –

A. WHEN I WAS SITTING IN THE CHAIR OR WHEN THEY WERE SITTING IN MY OFFICE?

BY MR. DALTON:

Q. AT WHAT POINT DID YOU REALIZE THAT TWO ATTORNEYS IN A CAPITAL TRIAL –

MR. NEVELS: OR DID YOU, I THINK WOULD BE THE QUESTION?

THE COURT: WELL, HE CAN ANSWER THAT BY SAYING I NEVER CAME TO THAT CONCLUSION.

MR. DALTON: RIGHT.

A. LOOKING BACK I WOULD SAY IT WOULD BE PREFERRED.

BY MR. DALTON:

Q. UH – IF YOU HAD SOUGHT OUT –

A. BUT I DON'T SAY THAT THAT MADE A MISTAKE. I JUST THINK IT WOULD BE PREFERRED, KNOWING EVERYTHING THAT HAPPENED TO ME WHEN THE WITNESSES WEREN'T GOING TO GET ON THE STAND.

Q. – IF YOU HAD SOUGHT OUT CO-EMPLOYEES AND YOU RAN ACROSS A CO-EMPLOYEE WHO COULD TESTIFY THAT WALTER KOON AIDED AND ASSISTED HIM IN A SHOOTING, WOULD THAT HAVE BEEN VALUABLE INFORMATION?

A. YOU'D HAVE TO GIVE ME MORE FACTS THAN THAT, MR. DALTON. AIDED AND ASSISTED HIM IN A SHOOTING?

Q. YEAH.

A. PULLED A GUN FROM SOMEBODY, TO PUT A TOWEL ON THE BULLET WOUND, I MEAN – I'M NOT JUST A BIG FAN OF THAT ABUSE THEORY THAT A LOT OF 'EM USE IN THE PENALTY PHASE.

Q. ALL RIGHT.

A. I'M SORRY, THAT'S JUST THE WAY I AM.

Q. DOES IT COME AS A SURPRISE TO YOU, AND I UNDERSTAND YOU'VE PRACTICED SOME CRIMINAL LAW –

A. SOME, SOME CRIMINAL LAW.

Q. – PRETTY, PRETTY MUCH OVER THE PAST FEW YEARS?

[57] A. WOULD WHAT COME AS A SURPRISE TO ME?

Q. PRETTY MUCH OVER THE PAST FEW YEARS?

A. HAVE I PRACTICED CRIMINAL LAW?

A. YES.

Q. OKAY. DOES IT COME AS A SURPRISE TO YOU THAT YOU CAN'T ACCEPT YOUR CLIENT'S VERSION OF THE FACTS, THAT YOU SHOULD INDEPENDENTLY ESTABLISH THEM YOURSELF?

A. NO, I, I LIKE TO BELIEVE MY CLIENTS. I LIKE TO BELIEVE WHAT THEY TELL ME. I LIKE TO GO INTO THE COURTROOM BELIEVING MY CLIENT SO THAT EVERYBODY ELSE THAT SEES WHAT I'M DOING KNOWS THAT I BELIEVE MY CLIENT.

Q. DID YOU EVER CONSIDER GIVING WALTER KOON A LIE, A LIE DETECTOR TEST YOURSELF?

A. NEVER DID.

Q. UH-HUH. NOW YOU SAY YOU HAVE YOUR OWN INVESTIGATOR IN YOUR OFFICE?

A. YES.

Q. WHAT DID HE DO TO GATHER EVIDENCE THAT COULD BE PRESENTED IN THE PENALTY PHASE ON BEHALF OF WALTER KOON?

A. HE WOULD TAKE ASSIGNMENTS FROM ME. I REMEMBER WE WENT AROUND AND AROUND ABOUT THE RECORDS FROM THE BATON ROUGE DETOX, THAT WOULD BE ONE.

Q. UH – YOU, YOU SAY YOU MADE A STRATEGIC DECISION NOT TO PRESENT A CHILDHOOD EVIDENCE AT PENALTY PHASE?

A. I CAN'T – YOU'RE, YOU'RE TRAILING OFF. CHILDHOOD?

Q. YES, DID YOU MAKE A STRATEGIC DECISION NOT TO PRESENT CHILDHOOD EVIDENCE AT THE PENALTY PHASE?

A. YES, I WAS CONCENTRATING ON THE GUILT PHASE.

Q. BUT YOU DID NOT SUBPOENA CHILDHOOD RECORDS FOR WHAT THEY MIGHT REVEAL?

A. I'VE ALREADY ADMITTED THAT TO YOU, THAT I DID NOT INVESTIGATE HIS CHILDHOOD AND I DIDN'T KNOW THAT HE WAS [58] STILLBORN.

Q. NOW –

A. TO BE HONEST WITH YOU, I DON'T – I MEAN, I DON'T KNOW WHAT – I DON'T KNOW HOW THAT WOULD EXCUSE YOU BECAUSE YOU WERE STILLBORN. THAT'S JUST THE WAY I THINK, OKAY? I MEAN, I JUST DON'T KNOW WHY THAT WOULD EXCUSE WHAT YOU DID BECAUSE YOU WERE STILLBORN?

A. YOU WOULDN'T KNOW UNLESS YOU INVESTIGATED IT.

Q. THAT'S PROBABLY TRUE, BUT THAT'S NOT WHAT I WAS CONCENTRATING ON. DO YOU – NEVER MIND.

Q. UH – DURING THE GUILT PHASE, THERE WAS A VIDEO INTRODUCED OF THE CRIME SCENE?

A. A VIDEO?

Q. YES, OF THE CRIME SCENE, OF THE HOUSE – INTERIOR?

A. THAT WAS A MISTAKE. I KNOW WHERE YOU'RE LEADING. I WENT IN THE BACK AND I OBJECTED TO ALL OF THESE PHOTOS, OKAY? WE LINED UP ABOUT TEN PHOTOS WE WERE GOING TO INTRODUCE AND BEFORE I KNEW IT, THE VIDEO TAPE WENT IN AND I JUST SAT THERE AND I DIDN'T OBJECT. THAT RIGHT THERE – I WISH I HAD OBJECTED.

Q. WELL ASSUMING THE VIDEO TAPE WAS ADMISSIBLE, DID YOU HAVE ANY REASON NOT

TO OBJECT TO THE AUDIO PORTION OF THAT TAPE?

A. NO.

Q. DID YOU MAKE THE STATEMENT –

A. I DON'T RECALL THE AUDIO ON THAT TAPE. I RECALL SITTING THERE AND THE MONITOR AND THERE BEING THIS STILL SILENCE IN THE COURTROOM AS IT PLAYED. I DON'T RECALL AN AUDIO. I COULD BE WRONG, BUT I REMEMBER THE JURORS STARTED CRYING DURING THAT VIDEO.

Q. DID YOU, AT THE TIME THAT YOU MET WITH MS. HUDSMITH AND, AND DAVID BALL, DID YOU MAKE A STATEMENT TO THEM THAT YOU FAILED TO INVESTIGATE OR BRING UP DURING THE PENALTY PHASE ANY MITIGATING FACTORS THAT COULD HAVE SOFTENED DR. HOPPS (SIC) [59] DEVASTATED – DEVASTATING COMMENT THAT KOON WAS NOT GUILTY OR REMORSEFUL?

A. COULD YOU – DID I MAKE THE STATEMENT THAT I FAILED TO OFFSET –

Q. DR. HOPP'S TESTIMONY THAT KOON WAS NOT GUILTY OR REMORSEFUL?

A. I DON'T KNOW IF I MADE THE STATEMENT, BUT I KNOW I GOT ON THE PHONE AT THE BREAK OF DR. HOPP'S TESTIMONY AND CALLED DR. ZIMMERMAN AND ASKED. DR.

ZIMMERMANN WHAT I COULD USE TO TRY AND COMBAT HIS TESTIMONY BECAUSE HIS TESTIMONY WAS VERY, VERY, VERY DAMAGING. AND HIS STATEMENT WAS, THAT HE CAN'T GIVE OPINIONS LIKE THAT ON BEING AN EVALUATOR. HE'S GOT TO BE TREATING SOMEONE TO GIVE THOSE KIND OF OPINIONS.

Q. DID YOU ALSO MAKE THE STATEMENT TO THEM THAT IF YOU HAD UTILIZED MISS VINET OR ANOTHER ATTORNEY AS SECOND CHAIR IN KOON'S TRIAL THE PENALTY PHASE. COULD HAVE MITIGATED THE CRIME OF WHICH KOON WAS CONVICTED, BECAUSE-THAT ATTORNEY WOULD HAVE BEEN PREPARED TO HANDLE IT? DID YOU MAKE THAT STATEMENT?

A. I PROBABLY DID AT THE TIME, YEAH. IN RETROSPECT LOOKING BACK, KNOWING HOW I FELT DURING THE PENALTY PHASE, YES.

Q. DID YOU MAKE THE STATEMENT THAT THE FAILURE TO INTRODUCE THAT LETTER WAS A GRAVE OMISSION –

MR. NEVELS: JUDGE, I –

BY MR. DALTON:

Q. – THROUGH THE MOTHER OR MR. KOON?

MR. NEVELS: – I HAVE AN OBJECTION. I'M PROBABLY GOING TO BE OVERRULED, BUT

I DON'T KNOW THAT THIS IS THE PROPER WAY TO IMPEACH THIS WITNESS. HE NEEDS TO ASK HIM A QUESTION AND THEN IF HE DENIES IT, THEN HE CAN BRING OUT THIS AFFIDAVIT, BUT IT IS SOMEBODY ELSE'S CHARACTER –

THE COURT: I DON'T THINK HE'S IMPEACHING HIM. I [60] THINK HE'S GOING – THIS IS DIRECT EVIDENCE ON WHAT MR. MONAHAN DID OR DID NOT DO.

MR. NEVELS: – WELL, JUDGE, I WOULD JUST OBJECT. IT IS SOMEBODY ELSE'S CHARACTERIZATION OF WHAT MR. MONAHAN SAID.

A. I KNOW AT THE TIME THE LETTER WASN'T INTRODUCED IT WAS STRATEGY, BUT I REGRETTED NOT INTRODUCING THE LETTER LATER. BECAUSE I READ IT AGAIN AND IT MOVED ME AGAIN. SO, WHEN I'M SITTING DOWN THERE TWO YEARS LATER WITH THEM AT THE TABLE, I WAS TELLING THEM, YEAH, I WISH I WOULD HAVE INTRODUCED THAT LETTER.

BY MR. DALTON:

Q. MR. –

A. BUT AT THE TIME, THE LETTER WAS NOT INTRODUCED IT WAS NOT, IT WAS NOT AN OMISSION. IT WAS A CONSCIOUSNESS THAT THEY'RE NOT GOING TO BUY THIS.

Q. – MR. MONAHAN, WERE YOU AWARE THAT SINCE THE 1980'S THERE HAVE BEEN REGULAR AND CONSISTENT DEATH PENALTY SEMINARS BY CAPITAL DEFENSE ATTORNEYS HELD IN THIS STATE?

A. YES.

Q. HAVE YOU EVER ATTENDED ONE?

A. YES.

Q. WHICH ONE?

A. PUT ON BY THE LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AT THE – I BELIEVE IT'S THE RADISSON IS WHERE IT WAS HELD.

Q. AND WHAT, WHAT YEAR WAS THAT?

A. I COULDN'T TELL YOU THAT.

Q. THAT WAS THE ONLY ONE YOU EVER ATTENDED?

A. YES.

Q. HAVE YOU READ ANY PUBLICATIONS DISTRIBUTED IN LOUISIANA –

THE COURT: WHAT'S THE POINT, MR. DALTON?

A. YEAH, THERE'S A BIG OLE' GREEN BOOK ABOUT THIS THICK ABOUT [61] DEATH PENALTY AND I'VE READ THAT AND –

THE COURT: I ASKED MR. DALTON A QUESTION. EXCUSE ME. WHAT'S YOUR POINT?

MR. DALTON: THAT EACH OF THOSE SEMINARS AND EACH OF THOSE PUBLICATIONS, STANDARD RECOMMENDATION IS FOR TWO ATTORNEYS IN A CAPITAL TRIAL.

THE COURT: I'M AWARE OF THAT AND I'M AWARE OF WHAT MR. MONAHAN DID AND WHAT HIS –

MR. DALTON: OKAY.

THE COURT: – ANSWER WOULD BE.

MR. DALTON: OKAY.

BY MR. DALTON:

Q. AT ANY TIME DURING YOUR REPRESENTATION OF WALTER KOON, DID YOU CONSULT WITH ANY OTHER WELL KNOWN CAPITAL, DEFENSE ATTORNEYS IN BATON ROUGE, SUCH AS JAMES BOREN, MICHELLE FOURNET, OR REBECCA HUDSMITH, OR JEAN FARIA?

MR. NEVELS: JUDGE, I –

BY MR. DALTON:

Q. OR SOME OTHER CAPITAL, DEFENSE LAWYER?

MR. NEVELS: – DON'T SEE THE RELEVANCE OF –

THE COURT: I CAN SEE THE RELEVANCE, BUT I DON'T REMEMBER MS. FARIA OR MS. HUDSMITH EVER TRYING ANY DEATH PENALTY CASES.

MR. NEVELS: I DON'T EITHER, JUDGE.

A. NO, I DIDN'T BECAUSE AT THAT TIME –

THE COURT: MAYBE MR. BOREN AND MAYBE MISS FOURNET.

MR. NEVELS: JUDGE, AND FOR PURPOSES OF THE RECORD, I WILL OBJECT – ANOTHER OBJECTION TO HIS QUESTION IS –

THE COURT: AND I MIGHT ALSO SAY THAT MR. MONAHAN HAS TRIED AS MANY AS THEY HAVE.

[62] MR. NEVELS: – AND FURTHER, JUDGE, I WOULD EXPECT THAT MR. DALTON INTENDS TO CALL EITHER MISS FOURNET OR MR. BOREN AS A EXPERT ON EFFECTIVENESS OF ASSISTANCE OF COUNSEL, WHICH DECISION IS COMPLETELY WITHIN THE PURVIEW OF THE COURT, AND I WILL SUBMIT, JUDGE, THAT YOU DO NOT NEED ANY EXPERT ASSISTANCE ON TELLING YOU WHAT SHOULD OR SHOULD NOT HAVE BEEN DONE. YOU CAN MAKE THAT DECISION. THAT'S MY OBJECTION TO THIS QUESTION AND IT'S GOING TO BE MY OBJECTION TO THOSE WITNESSES TESTIFYING AT ANY ADDITIONAL PROCEEDINGS.

A. NO, I DIDN'T BECAUSE I WAS NOT A FAN OF THEIR STYLE OF GIVING IN ON THE GUILT PHASE.

BY MR. DALTON:

Q. UH – MR. MONAHAN, THANK YOU.

A. THANKS, MR. DALTON.

THE COURT: ALL RIGHT.

MR. NEVELS: JUDGE, JUST A COUPLE OF QUESTIONS, JUST AS A FOLLOW-UP.

[63] RECROSS-EXAMINATION

BY MR. NEVELS:

Q. IN HINDSIGHT YOU COULD HAVE MADE OTHER DECISIONS, MR. MONAHAN?

A. YES.

Q. YOU COULD HAVE GIVEN MR. KOON A LIE DETECTOR TEST? YOU COULD HAVE MADE MORE OBJECTIONS TO THE INTRODUCTION OF CERTAIN EVIDENCE AT TRIAL?

A. YES.

Q. YOU COULD HAVE, BUT ALL-IN-ALL, YOU STILL FEEL THAT YOU DID WHAT YOU HAD TO DO TO COMPETENTLY REPRESENT MR. KOON?

A. AT THE TIME THAT I WAS SITTING IN MR. DALTON'S CHAIR, WAS DOING EVERYTHING THAT I COULD DO TO WIN THE CASE.

Q. AND THAT WAS BASED UPON YOUR EXPERIENCE AS A CRIMINAL ATTORNEY AND HAVING TRIED ANOTHER DEATH –

A. YES, AND HAVING BEEN SUCCESSFUL. MAYBE THAT WAS – MAYBE THAT GAVE ME CONFIDENCE THAT I'D BEEN SUCCESSFUL BEFORE.

Q. AND YOU DON'T THINK THE FACT THAT – UH – ANOTHER DEFENSE ATTORNEY – UH – MIGHT HAVE BEEN UNSUCCESSFUL, BUT YET TRIED TO ADOPT THE MITIGATING CIRCUMSTANCES-TYPE STRATEGY, WOULD BE ANYMORE SUCCESSFUL THAN YOU WOULD HAVE BEEN?

A. NOT AT THAT TIME WHEN I WAS THINKING ABOUT WHAT MR. KOON WAS UP AGAINST AND WHAT WE WERE PREPARING FOR HIS TRIAL.

Q. THANK YOU, SIR.

MR. DALTON: I HAVE NO QUESTIONS, YOUR HONOR. IN CONNECTION WITH THIS HEARING, I HAVE CERTAIN AFFIDAVITS THAT – SWORN STATEMENTS THAT INDICATE THESE WITNESSES COULD IMPEACH SOME OF THE THINGS THAT MR. MONAHAN HAS EXPRESSED. AND I WOULD ASK THE COURT TO EITHER

ACCEPT THESE AFFIDAVITS – UH – FOR THE PURPOSE OF ALLOWING TO IMPEACH – UH – MR. MONAHAN AND/OR ALLOWING ME AN OPPORTUNITY TO IMPEACH THE WITNESSES –

[64] REPORTER: I'M SORRY, MR. DALTON, I CANNOT HEAR YOU.

MR. DALTON: I'M SORRY. ALLOWING ME AN OPPORTUNITY IN THE FUTURE TO CALL OTHER – THE WITNESSES ON THESE AFFIDAVITS TO BACK 'EM UP IN FACT AND TRUTH?

THE COURT: LET ME SEE THE AFFIDAVITS?

MR. NEVELS: JUDGE, I –

MR. DALTON: I ALSO HAVE THE STATEMENTS ON TAPE, YOUR HONOR, IF YOU WANT TO LISTEN TO THEM.

MR. NEVELS: – FOR THE RECORD, JUDGE, THE AFFIDAVITS AND THE TAPES ARE CERTAINLY NOT THE BEST EVIDENCE, BUT UNDERSTANDING THIS COURT HAS RESERVED RULING ON WHETHER OR NOT MR. DALTON CAN CALL THESE ADDITIONAL WITNESSES, IF HE INTENDS TO SUBMIT THE MATTER ON THESE AFFIDAVITS OR WITH THESE TAPES – UH – THEN WE'LL WAIVE OUR OBJECTION. BUT IF HE INTENDS TO STILL CALL THESE WITNESSES, THEN I WOULD OBJECT AND ASK THAT THESE NOT BE INTRODUCED.

MR. DALTON: IF THE COURT ALLOWS ME, I FULLY INTEND TO CALL THESE AS WITNESSES.

THE COURT: THAT'S THE KEY QUESTION.

(REPORTER'S NOTE: THERE WAS A PAUSE IN THE PROCEEDINGS WHILE MESSRS. NEVELS AND DALTON SPOKE TOGETHER OFF-RECORD AT COUNSEL TABLE.)

THE COURT: LET ME GET YOU TO ANSWER A COUPLE OF QUESTIONS, MR. DALTON, AND CHARACTERIZE THESE FOR ME AND MAKE SURE I UNDERSTAND WHAT YOU'RE TALKING ABOUT HERE. YOU HAVE AN AFFIDAVIT SWORN BY MR. MICHAEL ROCKS, WHO IS THE CO-COUNSEL WITH YOU –

DALTON: YES, SIR.

THE COURT: – SAYING THAT HE INTERVIEWED THESE PEOPLE AND THIS IS WHAT THEY WOULD SAY?

[65] MR. DALTON: YES, SIR, AND THEN THEY ACKNOWLEDGED THAT THOSE CONTENTS WERE – UH – TRUE AND CORRECT ON THEIR OWN AFFIDAVIT BELOW.

BY THE COURT:

Q. MR. MONAHAN, I DON'T KNOW THAT YOU EVER GAVE THE NAMES OF THE PEOPLE THAT YOU SAID THAT YOU HAD CONTACTED

FOR THE PENALTY PHASE, BUT IF YOU WOULD, YOU'RE STILL UNDER OATH, JUST GIVE ME THOSE PEOPLE'S NAMES?

A. CAN I LOOK AT MY FILE?

Q. YOU DON'T KNOW 'EM?

A. TWO BROTHERS –

Q. THAT'S WHAT I – DO YOU KNOW THEIR NAMES?

A. – CHARLIE, ONE OF THEM WAS CHARLES.

Q. AND – IF YOU'VE GOT IT IN YOUR FILE, LOOK AT IT AND –

MR. DALTON: I WOULD SUGGEST THE NAME LEE KOON AND –

A. YEAH, LEE KOON. LEE WAS SITTING RIGHT THERE.

BY THE COURT:

Q. THAT'S THE OTHER – THE TWO? THE MOTHER AND THEN YOU TOLD US – WHAT'S THE MINISTER'S NAME?

A. ELTON.

Q. YOU GAVE ME HIS NAME?

A. YES.

Q. THE MOTHER AND THE TWO BROTHERS WERE THE OTHER ONES?

A. YES.

Q. ALL RIGHT.

MR. DALTON: YOUR HONOR, PARDON ME, FURTHER AT THIS TIME, I WOULD LIKE TO INTRODUCE KOON 1, OF WHICH I UNDERSTAND THE D. A. HAS NO OBJECTION.

MR. NEVELS: NO OBJECTION.

THE COURT: WHICH IS?

MR. NEVELS: IT'S – UH – POLICE REPORTS.

[66] THE COURT: POLICE REPORTS, ALL RIGHT. LET IT BE ADMITTED.

MR. NEVELS: AND I THINK THEY'RE ALREADY IN THE RECORD, AT ANY RATE.

CLERK: WHAT NUMBERS FOR ALL OF THESE?

MR. NEVELS: IN GLOBO.

THE COURT: ALL RIGHT, HERE YOU GO, FRANKIE. HERE ARE THE AFFIDAVITS. THEY'VE BEEN ADMITTED OVER MR. NEVELS OBJECTION.

MR. NEVELS: THANK YOU, YOUR HONOR.

THE COURT: ALL RIGHT, IT APPEARS THAT, WELL NOT APPEARS, IT IS – MR. NEVELS, MR. ROCKS – UH – WHAT DOES THAT MEAN?

MR. NEVELS: NOTHING, YOUR HONOR, WE'RE READY FOR YOU TO RULE.

THE COURT: ALL RIGHT. I THOUGH SOMEBODY ELSE WANTED TO SAY SOMETHING. OKAY. POST-CONVICTION RELIEF, ONCE THE PETITIONER IS IN CUSTODY AND AFTER A SENTENCE HAS BEEN IMPOSED, SHALL BE GRANTED ONLY ON THE FOLLOWING GROUNDS, AND ONE OF THOSE IS, THE CONVICTION WAS OBTAINED IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES AND OF THE STATE OF LOUISIANA. IN EFFECT, A CLAIM, JUST AS WE HAVE HERE, THAT MR. KOON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENT – THE STANDARD OF REVIEW IN MAKING THAT DECISION IS WHETHER OR NOT COUNSEL'S PERFORMANCE WAS DEFICIENT AND NOT THE RESULT OF REASONABLE PROFESSIONAL TACTICS. IF THE COURT WERE TO FIND THAT THERE WAS A DEFICIENCY – WERE THAT DEFICIENCY SUCH THAT IT WOULD DEPRIVE THE DEFENDANT OF A FAIR TRIAL, AND IN MAKING THAT DETERMINATION OF INEFFECTIVE ASSISTANCE OF COUNSEL, [67] LOOKING AT THE COMMISSIONER'S RECOMMENDATION OR REPORT,

I THINK THERE WERE NINE CLAIMS ORIGINALLY BY THE DEFENDANT. JUDGE MORGAN RECOMMENDED THAT THEY BE – TWO THROUGH NINE BE DISMISSED, WHICH I ADOPT. AND WE COME TO THE CLAIM ONE, INEFFECTIVE ASSISTANCE OF COUNSEL IN WHICH WE – THERE ARE FIVE AREAS IN HER REPORT, WHICH WE WERE TO EXPLORE THIS MORNING. FIRST ONE IS WHETHER COUNSEL PREPARED FOR TRIAL. AND UNDER THE CASE LAW, AGAIN, WAS THAT PREPARATION, I GUESS, OR THE PERFORMANCE SO DEFICIENT THAT THE DEFENDANT WAS UNABLE TO RECEIVE A FAIR TRIAL. AS TO THAT ISSUE, THE COURT FINDS THAT MR. MONAHAN WAS PREPARED. MR. MONAHAN DID A GOOD JOB WITH WHAT HE HAD TO WORK WITH. THAT HE PRESENTED EVIDENCE THAT HE FELT MIGHT, AT LEAST, MITIGATE THE DEFENSE – UH – MITIGATE THE ACTIONS OF MR. KOON IN THE GUILT PHASE, THAT HE THOUGHT THAT HE COULD, AND AS A RESULT OF HIS PRIOR EXPERIENCES COULD CONVINCE A JURY THAT MR. KOON DID NOT INTEND TO COMMIT THE ACTS THAT HE COMMITTED; THAT THERE WAS SOME OTHER FORCE, WHETHER IT BE DRUGS OR RAGE OR WHATEVER IT WAS THAT CAUSED MR. KOON TO COMMIT THE ACTS THAT HE DID. WOULD SOMEBODY ELSE HAVE DONE IT DIFFERENTLY? MAYBE. THAT DOESN'T MEAN THAT IT WOULD HAVE BEEN BETTER OR THAT DOESN'T MEAN THAT A RESULT WOULD HAVE BEEN AND

DIFFERENT. THAT'S A DETERMINATION THAT AN EXPERIENCED TRIAL LAWYER MAKES. MR. MONAHAN IS AN EXPERIENCED TRIAL LAWYER AND MR. MONAHAN MADE THAT DECISION THAT HE WOULD NOT, AS HE SAID, GIVE IN ON THE GUILT PHASE, BUT WOULD TRY THAT CASE WITH THE THEORY – WHAT HE REALLY WANTED TO TRY IT WITH WAS SOME TYPE OF DIMINISHED CAPACITY THEORY THAT REALLY DOESN'T EXIST IN LOUISIANA, BUT HE WAS ALLOWED TO GET SOME OF THAT EVIDENCE IN [68] FRONT OF THE JURY. THE NEXT QUESTION IS WHETHER HE WAS INEFFECTIVE FOR FAILING TO REQUEST CO-COUNSEL OR FOR FAILING TO OBJECT TO THE COURT'S DISMISSAL OF CO-COUNSEL AND WHETHER HIS REPRESENTATION WAS INEFFECTIVE FOR FAILURE TO HAVE CO-COUNSEL. TAKING EACH ONE OF THOSE QUESTIONS – TWO, IN THREE PARTS, I GUESS. HE REQUESTED CO-COUNSEL AND MISS VINET WAS APPOINTED. WHETHER OR NOT SHE DID ANYTHING OR WHETHER OR NOT MR. MONAHAN GAVE HER ANYTHING TO DO, I DON'T KNOW. IT APPEARS FROM THE TESTIMONY THAT SHE DIDN'T. MY THOUGHT PROCESS AT THE TIME THAT I APPOINTED MISS VINET WAS THAT SHE WOULD ASSIST HIM IN PREPARING THE DEFENSE IN ADDITION TO WHATEVER OTHER DUTIES SHE WOULD HAVE AT TRIAL. MR. MONAHAN CHOSE TO DO IT DIFFERENTLY. MR. MONAHAN IS A VERY HARDWORKING LAWYER WHO MAKES THE

STATE DO EVERYTHING THAT THEY'RE SUPPOSED TO DO IN ANY CASE THAT I'VE EVER SEEN THAT HE'S REPRESENTED ANYONE IN AND I THINK MR. MONAHAN PREFERS TO WORK ALONE FOR WHATEVER REASON. AND I THINK THAT MR. MONAHAN FELT THAT HE WAS CAPABLE OF HANDLING THIS CASE JUST AS HE DID. MR. MONAHAN DIDN'T OBJECT TO MISS VINET BEING RELIEVED WHEN SHE ASKED TO BE RELIEVED, STATING TO THE COURT THAT HE THOUGHT THAT HE COULD HANDLE IT. MR. MONAHAN'S TESTIMONY HERE TODAY WAS THAT WHEN PRESENTED WITH THE DILEMMA OF NOT HAVING CO-COUNSEL, HE CONSULTED WITH MR. KOON. MR. KOON SAID HE WAS WILLING TO GO FORWARD. HE WAS READY. HE WANTED TO GET IT OVER WITH. I DON'T HAVE ANY EVIDENCE TO THE CONTRARY. IN FACT, I HAVE EVIDENCE THAT SUPPORTS THAT FROM MR. KOON'S OWN STATEMENTS TO THE COURT. I QUESTIONED MR. KOON ABOUT THAT – WHETHER OR NOT HE WANTED TO HAVE MISS VINET OR SOMEBODY ELSE ASSIST MR. MONAHAN AND MR. KOON [69] SAID, I'D RATHER WAIVE HER APPEARANCE, YOUR HONOR, AFTER A RATHER LENGTHY QUESTIONING. AND I FEEL THAT MR. KOON REALIZED MR. MONAHAN WOULD REPRESENT HIM AND HE WAS AWARE OF WHATEVER DANGERS THAT THERE WERE IN IT – IN MR. MONAHAN'S SINGLE REPRESENTATION OF MR. KOON AND HE KNEW EXACTLY WHAT WAS

GOING ON AT THE TIME OF THE TRIAL. HINDSIGHT IS TWENTY-TWENTY. WHAT YOU'RE *DOING AT THE TIME, SOMETIMES ISN'T. MR.* KOON KNEW HE WAS GOING TO HAVE ONE LAWYER AND MR. KOON WAS AWARE OF THAT AND CHOSE TO GO FORWARD. SO ON THAT GROUND, I DON'T THINK THERE IS ANY INEFFECTIVE ASSISTANCE OF COUNSEL. THE THIRD ISSUE IS WHETHER HE FAILED OR REFUSED TO INVESTIGATE AND/OR PRESENT MITIGATING EVIDENCE AT THE PENALTY PHASE THUS RENDERING HIM INEFFECTIVE DURING THE PENALTY PHASE, AND THAT IS PROBABLY THE BIGGEST QUESTION THAT I HAVE IN THIS. AND, MAYBE, HAD THERE BEEN ANOTHER LAWYER MORE TESTIMONY MIGHT HAVE BEEN PRESENTED, MAYBE, NOT. MAYBE THE WITNESSES STILL WOULD HAVE HAD THE SAME REACTION – I DON'T WANT TO TESTIFY. I DON'T KNOW ANYTHING GOOD I CAN SAY ABOUT JOEY KOON – THE ONES THAT MR. MONAHAN HAD LINED UP. I DON'T KNOW WHO ELSE YOU CAN CALL OTHER THAN YOUR BROTHERS AND MOTHER. AND IF YOUR BROTHERS AND YOUR MOTHER – YOUR BROTHERS AND YOUR PREACHER REFUSE TO TESTIFY BECAUSE THEY DON'T HAVE ANYTHING GOOD TO SAY ABOUT YOU, I DON'T KNOW THAT, EVEN THOUGH NOW THERE ARE PEOPLE OUT THERE WHO ARE SAYING, ACCORDING TO YOUR AFFIDAVITS, THEY WEREN'T CONTACTED AND WERE WILLING TO

COME IN AND TESTIFY, I DON'T KNOW AT THE TRIAL IF THEY WOULD HAVE AN I DON'T KNOW *IF [70] THEY WOULD HAVE. IF YOUR OWN* BROTHERS DON'T HAVE ANYTHING GOOD TO SAY ABOUT YOU, WHAT THESE OTHER PEOPLE COULD HAVE SAID THAT WOULD CHANGE THE JURY'S MIND, WHICH IS ONE OF THE FACTORS, WHETHER OR NOT HE GOT A FAIR TRIAL BECAUSE MR. MONAHAN DIDN'T CALL EVERYBODY AND HIS BROTHER, SO TO SPEAK, TO TESTIFY ABOUT MR. KOON AND ANYTHING THAT HE MAY HAVE DONE THAT'S BEEN – UH – NICE OR ANYTHING THAT MAY HAVE AFFECTED HIM IN CHILDHOOD, I DON'T KNOW WHETHER THAT CHANGES ANYBODY'S MIND. BUT THE ISSUE IS WHETHER OR NOT HE GOT A FAIR TRIAL BECAUSE OF THAT AND WHETHER OR NOT MR. MONAHAN WAS INEFFECTIVE IN HIS REPRESENTATION IN THE DEFENSE OF MR. KOON, AND I DON'T THINK HE WAS, BECAUSE THE JURY WAS AWARE THAT MR. MONAHAN'S THEORY OF THE CASE WAS, FROM THE OPENING ROUND QUESTIONING OF THE JURORS, THAT BECAUSE OF HIS DRUG USAGE AND THEN NOT HAVING IT, MR. KOON WAS SOMEHOW NOT ABLE TO FORM SPECIFIC INTENT TO KILL OR TO INFLICT GREAT BODILY HARM AS REQUIRED BY THE FIRST DEGREE MURDER STATUTE. AND I DON'T THINK ADDING SOMEBODY TO TELL WHETHER OR NOT HE WAS STILLBORN OR WHETHER OR NOT HE HELPED A NEWSPAPER MAN WHO GOT SHOT,

THOSE ARE ALL THE DECISIONS THAT MAY OR MAY NOT CHANGE A JURY'S MIND, BUT IT DOESN'T MEAN THAT HE DIDN'T GET A FAIR TRIAL. TO THAT I DENY THERE WAS ANY INEFFECTIVE ASSISTANCE OF COUNSEL. THE ONLY TESTIMONY I HAVE CONCERNING THE – OR THE ONLY EVIDENCE I HAVE CONCERNING WALTER KOON'S TESTIMONY AT TRIAL IS WHAT MR. MONAHAN SAYS AND MY OWN INDEPENDENT RECOLLECTION OF THE VARIOUS CONVERSATIONS WITH MR. MONAHAN, AND THOUGH HE NEVER SPECIFICALLY CLAIMED TO ME THAT MR. KOON WOULD TESTIFY, HE ALWAYS – OR I WAS ALWAYS UNDER THE IMPRESSION THAT MR. KOON WAS GOING TO TESTIFY AND THAT MR. KOON WAS [71] ANXIOUS TO TESTIFY. AND THAT MR. KOON FELT THAT HE WAS GOING TO GET UP AND EXPLAIN WHY THIS WAS NOT A FIRST DEGREE MURDER AND WHY HE SHOULDN'T BE GIVEN THE DEATH PENALTY WAS MY IMPRESSION OF WHAT WAS HAPPENING DURING THE TRIAL AND PRIOR TO THE TRIAL, FROM MR. MONAHAN. WHETHER HE WAS INEFFECTIVE FOR FAILING TO OBJECT – LET'S GO BACK – AS TO QUESTION FOUR, I DON'T FIND ANY INEFFECTIVE ASSISTANCE OF COUNSEL. AS TO QUESTION FIVE, AS TO WHETHER HE WAS INEFFECTIVE FOR FAILING TO OBJECT TO SIGNIFICANTLY PREJUDICIAL EVIDENCE THAT COULD HAVE CHANGED OR UNDERMINED THE VALIDITY OF THE VERDICT. I'M NOT QUITE

SURE WHAT THAT MEANS. MR. MONAHAN ADMITTED ON THE WITNESS STAND THAT MAYBE HE SHOULD HAVE OBJECTED TO THE VIDEO THAT WAS INTRODUCED INTO EVIDENCE. MAYBE, HE COULD HAVE OBJECTED TO SOME OTHER THINGS, PROBABLY TO NO AVAIL BECAUSE I PROBABLY WOULD HAVE OVERRULED THE OBJECTIONS AND ALLOWED IT TO BE INTRODUCED INTO EVIDENCE, ESPECIALLY, THE VIDEO TAPE IN THE GUILT – I MEAN, IN THE PENALTY PHASE. AND AGAIN, I DON'T KNOW, ESPECIALLY, IN THE GUILT PHASE OF THE TRIAL THAT THERE WAS ANY EVIDENCE THAT COULD HAVE BEEN EXCLUDED THAT WAS PREJUDICIAL THAT WAS NOT ADMISSIBLE THAT WOULD HAVE HELPED MR. KOON AT ALL. MR. KOON VERY COLD-BLOODILY KILLED THREE PEOPLE. MR. KOON GOT ON THE WITNESS STAND AND CAME ACROSS AS SOMEBODY WHO VERY COLD-BLOODILY KILLED THREE PEOPLE. OTHER THAN JESUS CHRIST OR SOMEBODY COMING DOWN HERE AND SAYING DIFFERENTLY, I DON'T THINK THE JURY HAD ANY OTHER CHOICE, AS JURORS, BECAUSE THEY ARE SWORN IF THEY ARE CONVINCED BEYOND A REASONABLE DOUBT TO VOTE GUILTY. I DON'T THINK THERE'S ANY DOUBT IN ANYBODY'S MIND AND I DON'T THINK THERE'S ANY DOUBT IN THE JURY'S MIND THAT [72] MR. KOON WAS GUILTY OF FIRST DEGREE MURDER. I DON'T KNOW THAT ANY OF US COULD HAVE

PREVENTED THAT AND I DON'T KNOW THAT ANY EVIDENCE COULD HAVE PREVENTED MR. KOON FROM BEING CONVICTED, THAT MR. MONAHAN FAILED TO OBJECT TO, AND BEING SENTENCED TO DEATH. MR. KOON VERY COLD-BLOODILY KILLED THREE PEOPLE. THE JURY HEARD THAT AND THE JURY HEARD SOME MITIGATING FACTORS. THE JURY WENT IN AND IN A TWELVE TO NOTHING DECISION SAID TO SOCIETY THAT MR. KOON VERY COLD-BLOODILY KILLED THREE PEOPLE AND WE THINK THE REMEDY IS THAT HE SHOULD BE PUT TO DEATH. SO, AS TO EACH OF THE ISSUES THAT COMMISSIONER MORGAN RECOMMENDED THAT WE LOOK AT HERE TODAY, THE COURT IS OF THE OPINION THAT NONE OF THEM RISE TO THE LEVEL THAT WOULD BE REQUIRED TO STATE THAT MR. MONAHAN PROVIDED MR. KOON WITH INEFFECTIVE COUNSEL AT THE TRIAL, AT THE GUILT OR THE PENALTY PHASE. BECAUSE OF THAT, I'M GOING TO DENY THE REQUEST FOR POST-CONVICTION RELIEF.

MR. DALTON: YOUR HONOR, MAY I ADDRESS THE COURT?

THE COURT: YES, SIR.

MR. DALTON: FIRST, I WANT TO THANK, YOUR HONOR, FOR GIVING US A FAIR OPPORTUNITY TO PRESENT OUR CASE AND, HOWEVER, I DO WANT THE RECORD TO NOTE

MY OBJECTION TO NOT BEING ALLOWED TO CALL THE WITNESSES –

THE COURT: LET ME GET TO THAT POINT.

MR. DALTON: – ON MY WITNESS LIST.

THE COURT: MR. DALTON HAD SUBPOENAED SEVERAL WITNESSES TO TESTIFY IN THIS CASE OR IN THIS HEARING TO DETERMINE – CALLED SEVERAL WITNESSES THAT HE THOUGHT WOULD HELP ME IN MAKING MY DECISION AS TO WHETHER OR NOT MR. KOON RECEIVED A FAIR TRIAL AND WHETHER OR NOT MR. KOON HAD EFFECTIVE ASSISTANCE OF COUNSEL. AND I [73] DIVIDED THIS HEARING IN TWO PARTS, INTENTIONALLY, TO SEE IF I THOUGHT WE NEEDED TO CALL THOSE WITNESSES. AFTER HEARING MR. MONAHAN'S TESTIMONY AND MISS VINET'S TESTIMONY, THE COURT IS OF THE OPINION THAT I DON'T NEED TO HEAR THAT EVIDENCE TO MAKE THAT DETERMINATION. THE PURPOSE OF A POST-CONVICTION HEARING IS NOT TO RETRY THE CASE, NOT TO PRESENT DIFFERENT FACTS THAT MIGHT HAVE CHANGED THE JURY'S DECISION, BUT IN THIS CASE DETERMINE WHETHER OR NOT THE CONSTITUTION OF THE UNITED STATE AND OF THE STATE OF LOUISIANA WAS VIOLATED, AND THE COURT DOESN'T FIND THAT. THAT'S THE ONLY

GROUNDS UPON WHICH MR. KOON CAN SEEK RELIEF AT THIS LEVEL. ALL RIGHT.

MR. DALTON: NOTE MY OBJECTION FOR THE RECORD.

THE COURT: NOTE MR. DALTON'S OBJECTIONS. I TELL YOU WHAT, MR. DALTON, I ASSUME THAT YOU'RE GOING TO APPLY FOR WRITS OR APPEAL THIS DECISION, WHATEVER IS THE PROPER REMEDY?

MR. DALTON: YES, SIR.

THE COURT: THAT'S WHY I'VE GOT MY OTHER JUDGES UP HERE TO HELP ME FIGURE OUT WHAT I'M DOING HERE. HIS NEXT STEP IS TO GO TO THE SUPREME COURT ON THAT ISSUE, SO THERE IS NO NEED FOR ME TO DO ANYTHING ABOUT AN EXECUTION DATE. I'M GOING TO DO THIRTY DAYS TO GIVE MR. DALTON TIME TO PREPARE WHATEVER IT IS THAT HE NEEDS TO PREPARE COME BACK IN HERE AND SHOW ME OR LET US KNOW THAT YOU'VE PREPARED THE WRITS AND I WON'T SET AN EXECUTION DATE AT THIS TIME.

MR. DALTON: THANK YOU, YOUR HONOR. THANK YOU VERY MUCH.

MR. NEVELS: THANK YOU, JUDGE.

CLERK: YOU SAID THIRTY DAYS NOTICE?

[74] THE COURT: THIRTY DAYS.

CLERK: APRIL 27TH.

THE COURT: ALL RIGHT.

CLERK: DID YOU HEAR THE DATE, MR. DALTON? APRIL 27TH.

MR. DALTON: APRIL 27.

CLERK: IS THAT OKAY?

MR. DALTON: APRIL 27, YES, THAT'S FINE. THANK YOU.

HEARING CONCLUDED

[75] **CERTIFICATE**

I, HELEN F. HAMLETT, OFFICIAL COURT REPORTER, NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, DO HEREBY CERTIFY THE FOREGOING TO BE A CORRECT REPRESENTATION OF THE HEARING ON POST-CONVICTION RELIEF HELD HEREIN ON TUESDAY, MARCH 21, 2000, AS TO THE DEFENDANT, *WALTER JOSEPH KOON*, TO THE BEST OF MY ABILITY AND UNDERSTANDING.

THUS DONE IN BATON ROUGE, LOUISIANA THIS 4TH DAY OF APRIL, 2000.

/s/ Helen F. Hamlett
HELEN F. HAMLETT
C. C. R. NUMBER: 87136
OFFICIAL COURT
REPORTER

781 So.2d 1258

Supreme Court of Louisiana
STATE ex rel. **Walter** Joseph **KOON**
v.
STATE of Louisiana
No. 2000-KP-1205.

Jan. 26, 2001.

In re **Koon, Walter** Joseph; – Plaintiff; Applying Supervisory and/or Remedial Writs, Parish of E. Baton Rouge, 19th Judicial District Court, Div. L, No. 3-93-1268.

Denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-70018

WALTER J KOON

Petitioner-Appellee

v.

BURL CAIN, WARDEN, LOUISIANA STATE PENITENTIARY

Respondent-Appellant

Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

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ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Opinion 5/1/08, 5 Cir., ___, ___ F.3d ___)

(Filed May 28, 2008)

Before SMITH, WEINER, and OWEN, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court

be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

Amendment VI. Jury trials for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

> **(A)** the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

> **(i)** a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> **(ii)** a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to

support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction

proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Filed
Sept. 29, 2008

No. 08-255

IN THE
SUPREME COURT OF THE UNITED STATES

BURL CAIN, Warden,

Petitioner,

vs.

WALTER J. KOON,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit applied proper deference to the state courts' decisions in this habeas corpus proceeding.

2. Whether the Fifth Circuit properly applied the Supreme Court of the United States standard in this habeas corpus proceeding when addressing an ineffective assistance of counsel claim.

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No. 08-255

IN THE
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BURL CAIN, Warden,

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WALTER J. KOON,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

The respondent, Walter J. Koon, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case, which is unpublished.

STATEMENT OF THE CASE

1. Respondent Walter "Joey" Koon, then a 47-year-old man with no prior felony convictions, drove to the home of the parents of his estranged wife to give her money from the sale of their jointly owned vehicle. On the way, he was told by his passenger, Sarah Robinson, that his wife of some 15 years was having an affair. Respondent, who was then operating under a toxic mix of legal and

illegal drugs, alcohol and raw emotions, parked his truck, got out, pulled out his gun and shot and killed his wife, who was in the yard, and his wife's parents, who were in the house. He then drove to his home and called the police to come pick him up.

Kevin Monahan, a solo practitioner with a history of disciplinary complaints and sanctions from the Louisiana State Bar Association,[1] was appointed to represent respondent, who was charged with three counts of first degree murder. Monahan admittedly liked to work alone and was not a fan of mitigation evidence. Based solely upon his interview of respondent about the events leading up to the killings, Monahan decided to enter a dual plea of not guilty and not guilty by reason of insanity and put all of his defense in the guilt phase. Monahan intended to rely on the adverse impact of a variety of forces on respondent's mental state at the time of the killings whereby he, Monahan, would argue to the jury that respondent was either rendered insane or without the necessary specific intent or was acting in the heat of passion. If this guilt phase defense did not work, Monahan hoped it would "spill over" into the penalty phase defense against death. Thus, Monahan made no effort himself, or with the assistance of a second attorney, an investigator or a mitigation expert, to investigate respondent's life prior to the immediate events leading up to the killings beyond his interview with his client and his brief conversations with respondent's mother and two brothers. Moreover, despite the importance to the trial defense of the forces impacting respondent at the time of the killings, and the significance of the impact of those forces on respondent's mental state, Monahan made no attempt to interview Sarah Robinson, the only eyewitness to the events leading

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[1]In the latest, Monahan was placed on one year of supervised probation based upon disciplinary proceedings finalized in June of 2006, during which period any further misconduct by Monahan could be grounds for additional discipline, including further suspension from the practice of law. *In re: Kevin Patrick Monahan*, 932 So.2d 678 (La. June 30, 2006).

up to and including the killings and did not even hire a mental health expert to evaluate his client until the Sunday before the first degree murder trial began. The jury returned a verdict of guilty on all three counts of first degree murder and, after a penalty phase in which Monahan's defense against death consisted only of the brief, unprepared testimony of respondent's mother, returned sentences of death on each count.

2. When respondent sought to raise the claim of Monahan's ineffectiveness under the Sixth Amendment in state post-conviction proceedings, the state trial court would not allow him to call at the state evidentiary hearing any subpoenaed witnesses and only considered the testimony of Monahan and another attorney, Denise Vinet, who was briefly appointed to the case, but did nothing and did not participate in the trial. *See* Pet.App. 88-91, 196-198. In denying respondent the opportunity to present the testimony of his subpoenaed witnesses in support of his claim that his trial counsel was ineffective, the state trial court explained that, after hearing Monahan's testimony, "I don't need to hear that evidence to make that determination" since "[t]he purpose of a post-conviction hearing is not to retry the case, not to present different facts that might have changed the jury's decision." Pet. App. 197.

The state trial court rejected respondent's ineffective assistance of counsel claims, concluding that Monahan "was prepared" for trial and "did a good job *with what he had to work with*." Pet.App. 189 (emphasis added). According to the state trial court, "I don't know that any evidence could have prevented Mr. Koon from being convicted, that Mr. Monahan failed to object to, and being sentenced to death. Mr. Koon very cold-bloodily killed three people." Pet.App. 196. With regard to Monahan's failure to investigate the penalty phase, the state trial court acknowledged "that is probably the biggest question that I have in this." Pet.App. 192. The state trial court stated further,

"[m]aybe had there been another lawyer more testimony might have been presented, maybe, not." Pet.App. 192. Noting the existence of affidavits conflicting with Monahan's testimony that respondent's brothers and his preacher-uncle refused to testify at the penalty phase, the state trial court concluded, "I don't know if at the trial they would have [testified] . . ." Pet.App. 192-193. Moreover, the state trial court stated in this regard, "what these other people could have said that would change the jury's mind, which is one of the factors, whether or not he got a fair trial because Mr. Monahan didn't call everybody and his brother, so to speak to testify about Mr. Koon and anything that he may have done that's been . . . nice or anything that may have affected him in childhood, I don't know whether that changes anybody's mind." Pet.App. 193.

3. After exhausting his ineffectiveness claims in the state courts, respondent filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 by a person in state custody in federal court. Record on Appeal ("ROA") at Vol. 1, pp. 18-72. The federal district court initially ordered an evidentiary hearing limited to the question of whether respondent received ineffective assistance of counsel at the penalty phase of his trial. ROA at Vol. 1, pp. 169-170. Subsequently, the district court ruled that it would allow respondent to put on evidence at the evidentiary hearing relative to the guilt phase with respect to one witness, Sarah Robinson. ROA at Vol. 2, p. 179. Following a status conference after the federal evidentiary hearing, which spanned four days, the district court issued a notice and order that it had "informed both parties that it would consider Koon's claims of ineffective assistance of counsel as it related to both the guilt phase and the penalty phase of his jury trial," and "[n]o objections were made on this issue." ROA at Vol. 4, p. 532.

At the federal evidentiary hearing, Monahan again testified. In addition, respondent presented the testimony of Sarah Robinson, the eyewitness to the killings and to the events leading

up to them the week and hours prior, as well as the testimony of respondent's mother, two brothers and his preacher-uncle. Respondent also presented the expert testimony of psychologist Mark Vigen, Ph.D., psychiatrist George Seiden, M.D., and criminal defense attorney Phyllis Mann.

According to Monahan, the theory of defense, which he admitted was based solely on his conversations with respondent about the facts of the case, was that respondent "just had one bad week, beginning with the Friday afternoon, which was the week before the actual murder," and after he and his wife had physically separated, during which he ingested Xanax and other drugs with Sarah Robinson, and at the end of which he had not only lost his wife and had a tax lien and was sick, but he was told that his wife was having an affair and "he snapped." ROA at Vol. 8, pp. 97, 99, 112. Based on this, Monahan "felt that that was a heat-of-passion-type of thing, plus fueled by the fact that he was in some sort of withdrawal from all the chemicals that he had been ingesting." *Id.* at p. 100. Therefore, Monahan "went with he didn't know what he was doing. He, at that moment, did not know right from wrong because of the pressure, because of the withdrawal of the drugs." *Id.* at p. 106.

Prior to trial, Monahan entered on respondent's behalf a dual plea of not guilty and not guilty by reason of insanity. State Record ("St.R.") at Vol. II, p. 266. In addition, almost a year before the trial, Monahan moved for authority to retain a psychiatrist/psychologist for mental examination. St.R. at Vol. I, pp. 84-95. The state trial court granted the defense request by authorizing the expenditure of funds in the amount of $2,000 for a Dr. Cenac. *Id.* at p. 6. However, there is no evidence in the record that Dr. Cenac was ever employed by Monahan as an expert.

Despite relying on a mental health defense and despite having been granted funds for expert assistance well in advance of trial, Monahan did not employ the services of a mental health expert

until the Sunday before trial, at which time the expert, psychologist Marc Zimmerman, Ph.D., was able to spend just over an hour interviewing respondent. St.R. at Vol. VIII, pp. 1952, 1963. Dr. Zimmerman also administered several tests, including the Minnesota Multiphasic Personality Inventory ("MMPI"), but did not consult with any other family members or other collateral sources in making his diagnoses. *Id.* at 1973. As respondent's mental health experts testified at the federal evidentiary hearing without contradiction, because of Monahan's failure to employ the services of a mental health expert until the day before the first degree murder trial began, Dr. Zimmerman (1) did not have sufficient time to develop a complete psychological history of respondent; (2) did not have sufficient information, including information from sources collateral to respondent, upon which to base an opinion as to respondent's mental state at the time of the crime; (3) was in error in many significant respects, including his diagnosis of a non-existent psychological disorder; and (4) failed to elaborate adequately on the effect of substance abuse on respondent's behavior. ROA at Vol. 4, pp. 544-45. *See also* ROA at Vol. 5, pp. 88-93, 98, 155, 157. As respondent's expert psychiatrist, Dr. George Seiden, testified, "[i]f your defense is a mental-health defense, you're using a mental-status defense as your primary area of defense, your primary expert should be a mental status or mental-health expert. And that person needs to be hired more than a day ahead of time to work with you as an attorney." ROA at Vol. 6, p. 18.

According to Dr. Seiden, who performed an extensive evaulation of respondent, his mental status "clearly was impaired" at the time of the killings. ROA at Vol. 5, pp. 177-178, 182. Also according to Dr. Seiden, the effect on respondent's mental status at the time of the killings of each of the individual substances used by respondent, particularly Xanax, Valium, alcohol, cocaine and narcotic cough medicine, as well as respondent's mental and emotional state, needed to be, but was

not, explained to the jury at respondent's first degree murder trial. *Id.* at pp. 182-183.

In the State's rebuttal at the guilt phase to the expert mental health testimony Monahan did present, the prosecution called Dr. Donald Hoppe, a clinical psychologist who did not interview respondent, but only reviewed the results of the MMPI administered by Dr. Zimmerman. St.R. at Vol. IX, pp. 2162, 2166-2167. Again, because of Monahan's lack of investigation and preparation and his last minute hiring of Dr. Zimmerman, what expert mental health testimony was presented in support of Monahan's theory of defense was subject to attack to devastating effect. Not surprisingly, Dr. Hoppe criticized Dr. Zimmerman for not interviewing respondent for longer than an hour and for not getting "corroborating data from people who were familiar with him, particularly, at the time of the event, to know with any confidence, what was really going on at that time." *Id.* at 2177. Moreover, Monahan was totally unprepared to address Dr. Hoppe's testimony and was not even aware that, as respondent's expert psychologist Dr. Mark Vigen testified at the federal evidentiary hearing, there was simply no literature to support Dr. Hoppe's broad ranging interpretation of respondent's MMPI results to the effect that they showed respondent was not remorseful, was a liar, was manipulative and was violent. ROA at Vol. 5, pp. 110-112, 114-117, 119-120, 121-123. Further, it did not even cross Monahan's mind to request surrebutal or to call Dr. Zimmerman during the penalty phase to rebut the damaging testimony of Hoppe, the last word on respondent's mental health that the jury heard before they decided his fate. ROA at Vol. 8, pp. 152-154.

In addition to Monahan's failure to hire his chief expert witness until one day before trial, Monahan did not even attempt to interview Sarah Robinson, despite her critical status as the eyewitness to the killings and to the events leading up to the killings in the week and hours before.

According to Monahan, it was his practice never to interview a state's witness. ROA at Vol. 8, p. 110. Instead, Monahan hoped that Robinson would hear his opening statement and "if she heard those facts that I was saying, she would help [respondent] and say that she did tell him that she [his wife] was having an affair [with Joey LeBlanc] and that she [Robinson] was supplying drugs." *Id.* at 110-111. Contrary to Monahan's hope, at trial Robinson denied that respondent drank anything the Friday morning of the killings, claimed that she was not sure whether he drank any the previous Thursday night and denied seeing him take any drugs, including Xanax. St.R. at Vol. VII, p. 1732. She also denied that she told respondent that his wife was having an affair. *Id.* at p. 1769.

At the federal evidentiary hearing, Robinson testified and recanted critical aspects of her trial testimony regarding the circumstances leading up to the killings and further testified that she would have cooperated with Monahan prior to trial had he approached her. According to Robinson, had Monahan attempted to interview her before Koon's first degree murder trial, she would have told him about the drugs that respondent was doing *the morning of the killings*, which included cocaine, Xanax, Valium and beer, *as she told the state's attorney*. ROA at Vol. 5, pp. 27, 67. Moreover, Robinson also would have admitted that the truth is she did tell respondent about the affair with Joey LeBlanc on the way to his wife's parents' house, and she would have told Monahan had she simply been assured that she would not be held criminally responsible for the killings as a result of her statement in this regard, which was her big fear and her reason denying the statement at trial. *Id.* at 19, 26, 43, 66-67. As Robinson testified at the federal evidentiary hearing, "to this day I wish I would have never said anything [to respondent about the affair with LeBlanc]," and admitted to feeling tremendous guilt over what happened. *Id.* at 26, 43. After viewing "Robinson's demeanor carefully," the federal district court found "Robinson's testimony at the federal hearing to be very

credible, and accept[ed] it as true." Pet.App. 48.

4. The federal district court concluded that respondent was denied the effective assistance of counsel during the guilt phase of his first degree murder trial as a result of Monahan's failure to investigate and at least attempt to interview the only known eyewitness to the crime, Sarah Robinson. Pet.App. 51-57. Additionally, the district court concluded that Monahan was ineffective as a result of his failure to employ an expert witness on the issue of respondent's mental state at the time of the killings *until one day before* the trial. Pet.App. 57. The district court also concluded that Monahan's constitutionally deficient performance in the guilt phase of the first degree murder trial was prejudicial to respondent. Pet.App. 59. According to the district court, had Monahan attempted to interview Robinson before trial, she would have talked to him and told him about the drugs respondent was doing in the early morning hours of the day of the killings and confirmed that she had informed respondent of his wife's affair with LeBlanc only moments before respondent killed his wife and her parents. Pet.App. 60. Also, the district court concluded that Monahan's failure to provide Dr. Zimmerman with additional time, rather than one hour, one day before trial, was prejudicial. Pet.App. 61. According to the federal district court:

> The court is disturbed by Monahan's performance. A review of the record shows that Koon's actions could have been construed as something less than first-degree murder – be it second degree murder . . . or manslaughter . . . . Had Monahan investigated the case, outside of simply relying on what Koon told him, there is a reasonable probability that Koon would not have been found guilty of first degree murder. Thus it follows that confidence in the outcome of the trial has been undermined.

Pet.App. 62.

Significantly, the federal district court found that the state court, in finding that Monahan was prepared in that he "did a good job with what he had to work with," constituted an unreasonable

application of federal law as reflected in *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000). Pet.App. 62. As the federal court explained: "[t]he state court's reasoning fails to acknowledge that Monahan's performance was to be measured by an objective standard of reasonableness under prevailing professional norms, not by his own limited investigation." Pet.App. 63. Thus, what Monahan "had to work with" was limited by his own constitutionally deficient performance. Pet.App. 63.

The federal district court likewise concluded that, although there was significant evidence that respondent's mental state was impaired at the time of the killings, Monahan failed to introduce any such evidence in mitigation of death. Pet.App. 65-66. Moreover, the district court concluded that, directly contrary to Monahan's testimony, which the district court did not find credible, respondent's two brothers and his preacher-uncle were willing to say positive things about respondent in mitigation of the death penalty and were "very sincere and credible in this regard." Pet.App. 69. According to the district court, beyond the few family members Monahan very briefly spoke to, he did not investigate, prepare, or in essence even present a case in mitigation of death, despite the existence of a great deal of mitigation evidence, of which, Monahan was "not a big fan." Pet.App. 71. The district court concluded that Monahan failed to make a reasonable investigation into respondent's background that prejudiced respondent at the penalty phase of his first degree murder trial. Pet.App. 75-77. Again, the district court concluded that the state court, in rejecting the claim based on penalty phase ineffectiveness, "applied the wrong legal standard" and "unreasonably applied federal law." Pet.App. 80-81.

5. In affirming the federal district court's grant of habeas relief based upon ineffective assistance of counsel at the guilt phase of respondent's first degree murder trial, the Fifth Circuit

concluded, at the outset, that there was "no merit to the State's contention that the district court failed to afford proper deference to the state court's decisions and rulings. Pet.App. 2. Citing to 28 U.S.C. § 2254(d), the panel explained that a state court's decision that correctly identifies the governing legal rule but unreasonably applies it to the facts of a particular prisoner's case provides a sufficient basis for a federal habeas court to grant the writ. Pet.App. 2, 8-9. According to the Fifth Circuit: "[c]onsidering Monahan's failure to interview Robinson and his botched handling of Zimmerman, together with his other deficiencies identified by the district court, we see as inescapable the conclusion that Monahan's performance was deficient during the guilt/innocence phase of Koon's trial." Pet.App. 15. Also according to the appellate court, "[e]qually inescapable is the conclusion that Koon was prejudiced by Monahan's deficient performance: There is a reasonable probability that the jury would have convicted Koon of a lesser offense than first degree murder if Monahan's performance had not been deficient." Pet.App. 15-16. The Fifth Circuit concluded that, "the state court's ruling that Koon was not denied effective assistance of counsel during the guilt/innocence phase of his trial is objectively unreasonable." Pet.App. 17.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither The Decision Below Nor The Record Raises The Question Presented In *Bell v. Kelly*, No. 07-1223 Or Any Issue On Which There Is A Circuit Conflict

The petitioner seeks certiorari review on the basis that, pursuant to *Bell v. Kelly*, No. 07-1223 (cert. granted May 12, 2008), there is "a split in the circuits regarding the application of 28 U.S.C. § 2254(d) where new evidence is presented in a federal court." Pet. 9. As the petitioner notes, and as the opinion below evidences, the Fifth Circuit takes the position that the standard of § 2254(d)

applies even when new evidence relevant to a claim has been properly presented[2] for the first time on federal habeas. *Id.* Even if there is a circuit conflict on this issue, and even if it is one that this Court may resolve in *Bell v. Kelly*, it is irrelevant to the present case and petitioner's petition. Not surprisingly, petitioner did not argue below that § 2254(d)'s deferential standard should *not* apply in evaluating respondent's ineffectiveness claims as a result of the introduction of evidence the state court refused to consider and that was properly received for the first time at the federal evidentiary hearing. But neither did respondent argue this, and both the federal district court and the appellate court applied the deferential (and harsher from a habeas petitioner's perspective) standard of § 2254(d), but nevertheless concluded that respondent had satisfied it. As a result, even if this Court were to disagree with the Fourth Circuit, as well as the Fifth Circuit, in *Bell v. Kelly* and conclude that a habeas petitioner does not have to satisfy the more deferential standard of § 2254(d) in order to obtain relief on a claim predicated on evidence the state court refused to consider and that was properly received for the first time in a federal evidentiary hearing, it would have no impact on the correctness or the reviewability of this case. Accordingly, the pendency of *Bell v. Kelly* does not support the grant of certiorari review, nor does it warrant the holding of this petition (which the petitioner has not asked for) until *Bell v. Kelly* is argued and decided this Term.

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[2]While petitioner objected at the outset to a federal evidentiary hearing on respondent's ineffective assistance of counsel claims, it did not object to the federal district court's expansion of that hearing to include guilt phase as well as penalty phase ineffectiveness and did not raise the issue on appeal.

2. The Petition Does Not Warrant Review By This Court Since It Presents Nothing More Than A Disagreement With The Fifth Circuit's Application Of Settled Law To The Particular Facts Of This Case

It is clear from the petition that petitioner's primary disagreement with the federal courts below is not with the law, but with the application of the law to the facts of this case. As the petition puts it: "[t]he panel decision noted this Court's standard for reviewing habeas cases, but failed to properly apply that standard to the facts of this case." Pet. 11. This is an insufficient basis for certiorari review.

The Fifth Circuit applied this Court's settled precedent regarding ineffective assistance of counsel claims in its review of the district court's grant of habeas corpus relief in a straightforward case based on the failure of respondent's attorney to investigate and prepare for respondent's defense against first degree murder charges and the death penalty. Both with respect to the ineffective assistance of counsel claims and the state district court's adjudication of those claims, the case did not present an unusual set of facts or a unique issue of state law which this Court's precedents have not previously addressed. As petitioner conceded: "[t]he instant case is not an exceptional one." Pet. 32. As a result, this Court's recent grants of certiorari review in the habeas cases cited by petitioner, *see* Pet. 13-15, do not support the granting of certiorari review in this case simply because the petitioner disputes that the federal courts accorded the proper deference to the state courts under § 2254(d). *See, e.g., Knowles v. Mirzayance*, No. 07-1315 (cert. granted June 27, 2008) (involving review of Ninth Circuit's application of § 2254(d) in case presenting counsels' failure to advance the defendant's only affirmative defense, that of insanity, which unique factual situation has not been specifically addressed by this Court); *Waddington v. Sarausad*, No. 07-772 (cert. granted Mar. 17, 2008) (case involving application of standard of § 2254 to due process challenge to jury instruction

that state court found fully and correctly set out state law and for which state court concluded there was no reasonable likelihood that the jury misapplied the instruction so as to relieve the prosecution of its burden of proving all the elements of the crime); *Schriro v. Landrigan*, ___ U.S. ___, 127 S.Ct. 1933 (2007) (case involving factual situation not previously decided by this Court in which the client interfered with counsel's efforts to present mitigating evidence to a sentencing court by making an in-court waiver of his right to present a mitigation defense); *Carey v. Musladin*, 549 U.S. 70, 127 S.Ct. 649 (2006) (case which presented the issue of the potentially prejudicial effect of spectators' courtroom conduct for which there was a lack of holdings from this Court).

Since the decision below turns on the application, with which petitioner disagrees, of settled precedent of this Court to the particular facts of this case involving straightfoward claims of ineffective assistance of counsel as a result of multiple failures to investigate and prepare for respondent's defense against first degree murder and the death penalty, it does not warrant certiorari review.

3. The Fifth Circuit's Application To The Facts Of This Case Of This Court's Precedent Regarding Ineffective Assistance of Counsel Claims and The Review of State Court Adjudications of Those Claims Is Correct

At its essence, the petition disputes the correctness of the Fifth Circuit's application of this Court's opinions addressing ineffective assistance of counsel claims in the context of a first degree murder trial. The Fifth Circuit correctly recognized that the governing legal principles for respondent's claims of ineffective assistance of counsel were established by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Pet.App. 9. The appellate court acknowledged that ineffective assistance of counsel under *Strickland* is deficient performance by counsel resulting in prejudice, 466

U.S. at 687, with performance being measured against an "objective standard of reasonableness," *id.* at 688, "under prevailing professional norms." Pet.App. 9.

Moreover, as the Fifth Circuit correctly noted, this Court has long referred to American Bar Association ("ABA") Standards for Criminal Justice "as guides to determining what is reasonable," *Strickland*, 466 U.S. at 688. Pet.App. 9. The American Bar Association Standards for Criminal Justice in circulation at the time of respondent's trial in 1995 describe defense counsel's general duty to investigate as follows:

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities.

ABA Standards for Criminal Justice, Standard 4-4.1 (3rd ed. 1993) (hereinafter ABA Standards). As this Court stated in *Rompilla v. Beard*, 545 U.S. 374, 387, n. 6 (2005), we "cannot think of any situation in which defense counsel should not make some effort to learn the information in the possession of the prosecution and law enforcement authorities."

Citing to this ABA Standard, the Fifth Circuit correctly concluded that Monahan's failure even to *attempt* to interview Sara Robinson, the only eyewitness to the killings and to the critical events leading up to them, given that Monahan's defense centered on respondent's mental state at the time of the killings, constituted deficient performance *per se*. Pet.App. 11-12. Moreover, the Fifth Circuit concluded that Monahan's decision not to hire Dr. Zimmerman, his primary mental health expert, until *one day* before trial exacerbated his overall deficient performance at the guilt phase. Pet.App. 14. As the Fifth Circuit explained: "[n]ot only did Monahan make a questionable decision to pursue a detoxification defense on his own (without first consulting a medical

professional and substantiating his theory), but he then severely limited the effectiveness of even that questionable defense by enlisting an expert who was not given even minimally sufficient time to gather information in support of his opinions." Pet.App. 15. The Fifth Circuit concluded that "[c]onsidering Monahan's failure to interview Robinson and his botched handling of Zimmerman, together with his other deficiencies identified by the district court, we see as inescapable the conclusion that Monahan's performance was deficient during the guilt/innocence phase of Koon's trial." Pet.App. 15. This conclusion is entirely consistent with this Court's governing precedent.

In recent years, this Court has applied the standards established in *Strickland* in several cases and concluded in each that the petitioner's ineffectiveness claim was meritorious. Thus, for example, in *Williams v. Taylor*, 529 U.S. 362 (2000), this Court found that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions, because counsel had not fulfilled their obligation to conduct a thorough investigation of the defendant's background. 529 U.S. at 396 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980). Likewise, in *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court concluded that capital defense counsel, who hired a psychologist to evaluate the petitioner and who reviewed both a previous PSI that included some of petitioner's life history and noted his misery as a youth and department of social service records that documented his foster care placements, nevertheless was ineffective because "[c]ounsel's decision not to expand their investigation beyond the PSI and the DSS records fell short of the professional standards that prevailed in Maryland in 1989," which included the preparation of a social history report. 539 U.S. at 523-524. This Court also concluded that counsel's failure to expand the investigation into petitioner's life history "fell short of the standards for capital defense

work articulated by the American Bar Association (ABA)-standards to which we long have referred as 'guides to determining what is reasonable.'" 539 U.S. at 524, *quoting Strickland v. Washington*, 466 U.S. at 688. And in *Rompilla v. Beard*, 545 U.S. 374 (2005), this Court once again found a capital habeas petitioner's claim of ineffective assistance of counsel claim had merit, holding that:

> [E]ven when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.

545 U.S. at 377. This Court emphasized that "[t]his case, like some others recently, looks to norms of adequate investigation in preparing for the sentencing phase of a capital case, when defense counsel's job is to counter the State's evidence of aggravated culpability with evidence in mitigation." *Id.* at 380-381. Furthermore, this Court concluded that "*[t]he notion that defense counsel must obtain information that the State has and will use against he defendant is not simply a matter of common sense*," but is dictated by the ABA Standards for Criminal Justice in circulation at the time of Rompilla's trial. *Id.* at 387 (emphasis added). The Fifth Circuit's conclusion that Monahan's failure to even attempt to interview the eyewitness to the killings, whom he knew would be a witness for the prosecution, as well as his failure to employ the services of his key mental health expert in support of his mental health defense until the Sunday before trial, constitutes deficient performance in light of the then-prevailing professional norms regarding an attorney's duty to investigate is entirely consistent with these Supreme Court cases.

With respect to the issue of prejudice, the Fifth Circuit's "inescapable" conclusion was that respondent "was prejudiced by Monahan's deficient performance: There is a reasonable probability that the jury would have convicted Koon of a lesser offense than first degree murder if Monahan's

performance had not been deficient." Pet. App. 15-16. This is the correct standard as set forth by this Court in *Strickland*: to establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. As the Fifth Circuit explained:

> If Monahan had interviewed Robinson before trial, she may have told the truth instead of controverting Koon's testimony regarding his mental state at the time of the killings. It follows that the jury could have and likely would have given greater consideration to the "heat of passion" aspect of Koon's defense. If, on the other hand, Robinson had continued to insist on denying that she had told Koon about his wife's affair after Monahan interview her, he would have been aware of Robinson's intended testimony and could have adjusted his defensive strategy accordingly and mitigated the damaging effects of Robinson's testimony. Furthermore, if Zimmerman had been retained a reasonable time in advance of trial, he would have had plenty of time to evaluate Koon and interview his friends and family. That way, Zimmerman could have formulated a more informed opinion on Koon's mental state and been prepared to support and defend that opinion on cross-examination. In short, if Monahan's performance had not been deficient and prejudicial, it is probable that Koon's level of culpability would have been reduced in the eyes of the jury. These failings by Monahan, which subverted both the insanity and manslaughter aspects of Koon's defense, undermine any confidence we might otherwise have in the propriety of his first degree murder conviction.

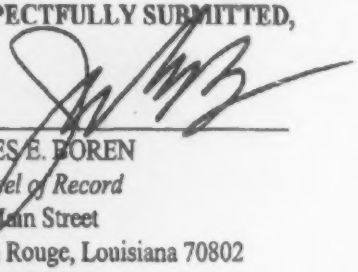
Pet.App. 16-17. This application of this Court's standard of prejudice as set forth in *Strickland* to the facts of this case is correct and consistent with the opinions of this Court. *See, e.g., Rompilla v. Beard*, 545 U.S. at 393 (because of defense counsel's failure to look in the file on Rompilla's prior conviction, evidence in mitigation was not discovered which, "taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability," and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing) (citations omitted).

Finally, the Fifth Circuit correctly concluded that the state court's ruling that respondent was not denied the effective assistance of counsel at the guilt/innocence phase of his trial was objectively unreasonable. Pet.App. 17. As previously noted, the state trial court found with respect to respondent's ineffectiveness claim that Monahan was prepared for trial and "did a good job *with what he had to work with*." Pet.App. 189 (emphasis added). This conclusion, however, fails to recognize that "what he had to work with" was limited by Monahan's critical failure to investigate, a failure that is itself ineffective assistance of counsel. Moreover, according to the state trial court, "he presented evidence that he felt might, at least, mitigate . . . the actions of Mr. Koon in the guilt phase, that he thought that he could, and as a result of his prior experiences could convince a jury that Mr. Koon did not intend to commit the acts that he committed; that there was some other force, whether it be drugs or rage or whatever it was that caused Mr. Koon to commit the acts that he did." *Id.* This conclusion likewise fails to recognize that the standard by which counsel's performance is to be judged is not what worked once before for counsel, but what is mandated by the Constitution, Supreme Court precedent, and prevailing professional norms, all as set forth above. Under the circumstances, the Fifth Circuit's conclusion that the state court's ruling denying relief based upon ineffective assistance of counsel at the guilt/innocence phase was objectively unreasonable is entirely consistent with this Court's precedent. *See, e.g., Rompilla v. Beard*, 545 U.S. at 390 (the state courts were objectively unreasonable in concluding that trial counsel could reasonably decline to make any effort to review a client's prior conviction file that the prosecutor says it will use at trial). Accordingly, the opinion below, for which there was no dissent or *en banc* consideration, was correctly decided on the merits and, thus, does not warrant certiorari review.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED,



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No. 08-255

IN THE
SUPREME COURT OF THE UNITED STATES

BURL CAIN, Warden,

Petitioner,

vs.

WALTER J. KOON,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

CERTIFICATE OF SERVICE

I, James E. Boren, a member of the Bar of this Court, hereby certify that on this 29th day of September, 2008, one copy of the respondent's Brief in Opposition to the Petition for a Writ of Certiorari in the above-entitled case was mailed with first class postage prepaid to the Mr. Dale R. Lee, Parish of East Baton Rouge, 222 St. Louis Street, 5th Floor, Baton Rouge, LA 70802, counsel of record for petitioner herein. I further certify that all parties required to be served have

been served.

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